TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 31

CHARLES CLARENCE HAMILTON, PETITIONER,

vs.

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED NOVEMBER 11, 1960
CERTIORARI GRANTED JANUARY 9, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

No. 640

CHARLES CLARENCE HAMILTON, PETITIONER,

vs.

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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[fol. 1]

IN THE SUPREME COURT OF ALABAMA

Sixth Division No. 604

Ex parte:—Charles Clarence Hamilton

Petition for Writ of Error Coram Nobis

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama

Your Petitioner, Charles Clarence Hamilton, respectfully represents and shows unto this Honorable Court the following facts upon which the Petitioner seeks affirmative relief, to-wit:—

1. On the night of October 12, 1956, or the morning of October 13, 1956, in Ensley, Alabama, petitioner, a Negro, was found in the bedroom of Mrs. Mary Giangrosso, an elderly white woman, by her granddaughter's husband, Mr. Jacob Milko, who held petitioner at gun point, and called the police. [*Hamilton v. State, 116 So. 2d 906*]. Petitioner was arrested, and subsequently indicted by a Grand Jury of Jefferson County, Alabama, on to-wit: November 9, 1956, for burglary in the nighttime with intent to steal, which cause was docketed on November 13, 1956, in the Circuit Court of Jefferson County, Alabama, as State of Alabama vs. Charles Clarence Hamilton, Case No. 98512. [See Exhibit "B" certified copy of Trial Docket Sheet, attached hereto, and made part hereof]. On arraignment, on to-wit: January 4, 1957, the date of arrignment, the Honorable Clell L. Mayfield, a practicing lawyer, with offices in Birmingham, Jefferson County, Alabama, was appointed to defend petitioner and entered a plea of not guilty, and trial was set for January 14, 1957. Trial date was subsequently passed to March 12, 1957, then to March 13, 1957; to April 23, 1957, and finally to April 24, 1957, when the case was nolle prossed on recommendation of the Solicitor. [See Exhibit "B"]

Subsequent to November 9, 1956, and while the above said cause was pending, the Grand Jury of Jefferson

[fol. 2] County, Alabama, on to-wit: February 12, 1957, indicted petition for Burglary with intent to Steal, and Burglary with intent to Ravish [See Exhibit "C"], and the case was subsequently Docketed on to-wit: February 12, 1957, in said court as State of Alabama vs. Charles Clarence Hamilton, No. 98942. On March 1, 1957, petitioner was arraigned in this cause, and entered a plea of not guilty [See Exhibit "C"]. On to-wit: March 4, 1957, the Honorable Clell I. Mayfield was appointed by the Court to defend petitioner [Exhibit "C"].

2. After a trial by Jury, defendant was found guilty of Burglary in the nighttime with intent to ravish and his punishment fixed at death by electrocution. On appeal to this Honorable Court under the automatic appeal statute, the judgment of the trial Court was affirmed. *Hamilton vs. State*, 116 So. 2d 906. Petitioner's application for rehearing was denied on to-wit: January 21, 1960. On the 20th day of May, 1960, petitioner applied to the United States Supreme Court for Writ of Certiorari to this Honorable Court which application was denied on to-wit: June 28, 1960.

The transcript of the record filed in this Honorable Court on above said appeal [*Charles Clarence Hamilton vs. State of Alabama, Sixth Division No. 164*], set out the minute entry on page 1 which recited that petitioner was represented on arraignment by attorney. Petitioner attacked the minute entry on appeal in this Honorable Court and in the United States Supreme Court on Petition for Writ of Certiorari, as being in error, and offered in support thereof, the Judge's minute entry, which recited that the attorney for petitioner was not appointed until March 4, 1957. [*Hamilton v. State, 116 So. 2d, 906*].

3. This Honorable Court held in the above said appeal that although it had no argument with appellant's contention, that in capital cases defendant is entitled to effective counsel from time of arraignment throughout the trial—and that denial of such was a violation of the equal protection and due process clause of the Fourteenth Amendment to the United States Constitution, and Sections 1 and 6 of the Constitution of the State of Alabama, but that the principle was without application to the record before it. The ruling of the Court was sustained in

the opinion of Mr. Chief Justice Livingston, by the principle, supported by numerous cases, that the minute entry of record may not be impeached by the Judge's bench [fol. 3] notes. —[*Hamilton v. State, 116 So. 2d 906*]. Subsequent to the said appeal, petitioner's attorneys, on to-wit: July 19, 1960, were finally able to obtain from the Honorable Clell L. Mayfield, attorney of record on petitioner's trial, an affidavit to the effect that according to his knowledge, information and belief, he was not appointed in case No. 98942 wherein petitioner was tried and convicted for nighttime burglary with intent to ravish, and sentenced to death by electrocution, until March 4, 1957; that he did not represent petitioner on arraignment, nor consult or advise with him. Mr. Mayfield's said affidavit is made a part hereof and attached hereto as Exhibit "A".

4. Petitioner's right to Counsel at the time of arraignment was fundamental. Mr. Mayfield's affidavit attached hereto and made a part hereof clearly proves that the judgment of the court below was a nullity; that petitioner, under the circumstances was denied his right to a fair trial and to due process of law as guaranteed him by the laws and Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States of America.

Premises Considered, Charles Clarence Hamilton prays that this Honorable Court will enter an order granting to him the right to file a petition in the Circuit Court of Jefferson County, Alabama, for a Writ of Error Coram Nobis to inquire into the facts alleged herein and if the relief prayed for herein is not just, and proper, then, in that event, Charles Clarence Hamilton prays for such other, further, general or special relief as may with the Court seem meet and proper, and as in duty bound petitioner will ever pray.

/s/ Charles Clarence Hamilton
Petitioner

Orzell Billingsley, Jr.

Peter A. Hall
Attorneys for Petitioner
1630-4th Avenue, North
Birmingham, Alabama

[fol. 4] VERIFICATION OMITTED IN PRINTING

CERTIFICATE OF SERVICE OMITTED IN PRINTING

[fol. 5] PETITIONER'S EXHIBIT "A" TO PETITION

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

AFFIDAVIT

Clell I. Mayfield, being an attorney licenses to practice in the State of Alabama, does hereby state that he was the attorney of record for Charles Clarence Hamilton in the Circuit Court of Jefferson County, Alabama, Tenth Judicial Circuit. That he was initially appointed as counsel for the defendant on January 4, 1957, in case number 98512, State of Alabama vs. Charles Clarence Hamilton which case was nolle prossed on April 24, 1957. That prior to April 24, 1957, to-wit: March 4, 1957, the said attorney was appointed as counsel for the defendant in case number 98942, State of Alabama vs. Charles Clarence Hamilton. That said attorney states to the best of his knowledge, information and belief that he was not present at the arraignment of said Charles Clarence Hamilton on March 1, 1957. Said attorney further states that he did not advise or consult with said defendant at the arraignment of March 1, 1957.

/s/ Clell I. Mayfield
CLELL I. MAYFIELD

Personally appeared before me Jefferson D. Boling, a Notary Public for the State of Alabama, Jefferson County, Clell I. Mayfield, who first being sworn states the above facts to be true to the best of his knowledge, information and belief.

Sworn to and subscribed on this the 19th day of July, 1960.

/s/ Jefferson D. Boling
[SEAL] Notary Public

[fol. 6]

PETITIONER'S EXHIBIT "B" TO PETITION

JURY—NON-JURY

THE JUDICIAL CIRCUIT OF ALABAMA

NO. 7851

PARTIES	ACTION	SHERIFF'S RETURN	PLEADINGS FILED	SET FOR HEARING
THE STATE VS. Charles Clarence Hamilton	Ind. BIDH Nightime	Jail 11-9-56		
ATTORNEYS Mayfield	Deason			
CASE DOCKETED Nov 13 1956	ORDERS OF COURT			

1-4-57

The defendant being [illegible] Court and having been duly arraigned pleads not guilty. Case set for trial 1-15-57

W Inzer Judge

RECORDED
Minute Bk. Vol 172 Pg. 17

represent _____ in this case.

_____ Judge.

1-4-57

It appearing to the Court that the defendant is without counsel and unable to employ counsel, Hon. Charles Mayfield is hereby appointed to represent [illegible] in this case.

W Inzer Judge.

RECORDED
Minute Bk. Vol 172 Pg. 17

JAN 15 1957 Ready
FEB 19 1957 passed to
MAR 12 [illegible]

PASSED to file Feb 19, 1957. Judge Inzer
passed to March 12, 1957 W. Inzer

PETITIONER'S EXHIBIT "B"—Continued

FEB 8 - 1957

The defendant in open court [illegible] been previously arraigned, [illegible] for trial

FEB 19

King Judge

RECORDED Minute Bk. Vol. 172 Pg. 276

MAR 12 1957 Passed to Mar. 13 1957. King J.

MAR 13 1957 Read. Passed to April 23, 1957 King J.

APR 23 1957 Read. Passed to April 24-1957 W. Gibson J.

April 24, 1957 Motion granted due to fault in indictment on rec. Dep. Sol. Deason W. Gibson - Judge

RECORDED Minute Bk. Vol. 172 Pg. 286

PETITIONER'S EXHIBIT "C" TO PETITION

JURY---~~NON~~-JURY

10th JUDICIAL CIRCUIT OF ALABAMA

NO. 98942

PARTIES	ACTION	SHERIFF'S RETURN	PLEADINGS FILED	SET FOR HEARING
THE STATE VS. Charles Clarence Hamilton ATTORNEYS Clell D. Mayfield	Ind. BURG WIS BURG W/RAV	Capias Ex 2-12-57 Deceased	5-13-57 Defendant's statement of indigency filed. 5-22-57 Motion filed for new trial 7-26-57	

CASE DOCKETED Feb 12 1957

ORDERS OF COURT

March 1, 1957 Arraigned this date - plea not guilty.

MAR 4-1957

RECORDED
Minute Bk. Vol. 172 Pg. 406
Gil Gibson Judge

It appearing to the Court that the defendant is without counsel and unable to employ counsel, Hon. Clell D. Mayfield is hereby appointed to represent him in this case.

King
Judge

RECORDED
Minute Bk. Vol. 172 Pg. 421

The defendant in open court and [illegible] heretofore arraigned, came also for trial

3/4/57

March 13, 1957.

King Judge

RECORDED
Minute Bk. Vol. 172 Pg. 42[illegible]

MAR 13 1957 Ready. Passed to April 23, 1957. King J.

RECORDED
Minute Bk. Vol. 172 Pg. 472

APR 23 1957 Ready. Jury. Jury Verdict "We the jury find the defendant guilty of Burglary in the first degree as charged in Count 2 of the indictment and fix his punishment at Death. Clarence A. Tolbert, Foreman" Wallace Gibson J.

The defendant being called before the Court for sentence is asked whether he has anything to say as to why sentence should not be pronounced against him says

[fol. 8] (File Endorsement Omitted)

IN THE SUPREME COURT OF ALABAMA,
SIXTH DIVISION

No-164

(Title Omitted)

PETITION FOR STAY OF EXECUTION—Filed July 27, 1960

Comes now the appellant in the above-styled cause, by his attorneys, and petitions the Honorable Court to suspend execution of the sentence heretofore rendered in this case, and to stay execution of the Death Sentence heretofore set for July 29, 1960, and as grounds for said petition appellant shows the Honorable Court the following:—

1. That appellant was tried for and convicted of the crime of First Degree Burglary with the intent to ravish by the Jefferson County, Alabama, Circuit Court on to-wit: the 24th day of April, 1957, and sentenced to be executed in the electric chair.

2. That on appeal, this Honorable Court affirmed the Judgment of the Circuit Court and on to-wit: the 21st day of January, 1960, denied his petition for rehearing.

3. Petitioner's application to the United States Supreme Court for Certiorari was denied on to-wit: June 28, 1960.

4. On appeal in this Honorable Court and in the United States Supreme Court, petitioner citing the judge's bench notes urged, among other things, that he had been denied a fair trial and due process of law as guaranteed him by the statutes and sections 1 and 6 of the Constitution of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States, in that he had not been represented by counsel on arraignment. Although a pro forma recitation in the record indicated that he had been so represented.

5. On to-wit: July 19, 1960, present attorneys for petitioner were for the first time, able to obtsin an affidavit

from the Honorable Clell I. Mayfield, petitioner's attorney of record on the trial below, to the effect that to the best [fol. 9] of his knowledge, information and belief, he was not appointed to represent petitioner in the cause in which he was convicted and sentenced to death by electrocution, until after his arraignment, and that he did not consult with him or advise him on said arraignment.

The said affidavit is attached to a petition for Writ of Error Coram Nobis to be filed in this Honorable Court. A signed copy is attached hereto and made a part hereof.

Petitioner intends forthwith, to make application to this Honorable Court, for leave to file his petition for Writ of Error Coram Nobis, and that the execution of the Sentence in this cause set for July 29, 1960, should be suspended until this Honorable Court has passed upon this matter.

/s/ Orzell Billingsley, Jr.
Peter A. Hall

Duly Sworn to by Orzell Billingsley, Jr. and Peter A. Hall
(Jurats Omitted in Printing)

[fol. 10] (File Endorsement Omitted)

STATE OF ALABAMA
Office of the Governor

NAME CHARLES CLARENCE HAMILTON

COUNTY JEFFERSON

OFFENSE BURGLARY—1st Degree

CONVICTED APRIL 24, 1957

SENTENCE DEATH—July 29, 1960

EXECUTIVE ORDER GRANTING REPRIEVE—July 28, 1960

It is hereby ordered by me, as Governor, that reprieve be, and it is hereby granted to Charles Clarence Hamilton until Friday, August 19, 1960, at which time, unless otherwise ordered, let the sentence of death be executed.

LET ORDER ISSUE ACCORDINGLY.

/s/ John Patterson
GOVERNOR

No. 5
July 28, 1960

ISSUED
JULY 28, 1960

SECRETARY OF STATE

[fol. 11] (File Endorsement Omitted)

IN THE NAME AND BY THE AUTHORITY
of
THE STATE OF ALABAMA

• • • •

I, JOHN PATTERSON,

GOVERNOR OF THE STATE OF ALABAMA,

• • • •

To all Sheriffs, Keepers of Prisons, Civil Magistrates and others to whom these Presents shall come—
GREETINGS:—

WHEREAS, at the April Term, 1957 of the ..... Court held for the County of Jefferson Charles Clarence Hamilton was convicted of the crime of Burglary—1st Degree and sentenced to Death—July 29, 1960

AND, WHEREAS, for divers good and sufficient reasons it appears to me that the said Charles Clarence Hamilton should be granted a reprieve is a fit subject for Executive Clemency;

Now, Therefore, I, John Patterson, Governor of the State of Alabama, by virtue of the power and authority in me vested by the Constitution and laws of the State of Alabama, do by these presents, order that reprieve be, and it is hereby granted to Charles Clarence Hamilton until Friday, August 19, 1960, at which time, unless otherwise ordered, let the sentence of death be executed.

Witness my hand, and the Great Seal of the State at Office, in the City of Montgomery, this 28 day of July, 1960.

[SEAL.]

/s/ John Patterson,
Governor of Alabama.

By the Govenor:

/s/ Bettye Frink,
Secretary of State.

[fol. 12] (File Endorsement Omitted)

IN THE SUPREME COURT OF ALABAMA

(Title Omitted)

ANSWER TO PETITION FOR WRIT OF ERROR CORAM NOBIS—
Filed August 3, 1960

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama:—

Comes now The State of Alabama, respondent in the above-styled cause by and through its Attorney General, and in answer to that petition for writ of error coram nobis heretofore filed by Charles Clarence Hamilton, a prisoner under sentence of death, declares the following:—

1. The petition lacks a probability of truth.
2. The petitioner was represented by counsel at the time of his arraignment on March 1, 1957, and such affirmatively appears of record and by exhibits. [See Exhibits A and B attached hereto and made a part hereof].
3. Non-representation of counsel at the time of arraignment is not per se a denial of due process. The petitioner must make some showing or allegation of injury or prejudice to this cause. [See Exhibit C attached hereto and made a part hereof].
4. The petitioner has alleged no showing of prejudice and such affirmatively appears of record.

WHEREFORE The State of Alabama does urge this Honorable Court to deny the petition.

Respectfully submitted,

/s/ MacDonald Gallion
Attorney General

/s/ James W. Webb
Assistant Attorney General

[fol. 13] CERTIFICATE OF SERVICE
OMITTED IN PRINTING

[fol. 14] EXHIBIT A TO ANSWER

STATE OF ALABAMA)
JEFFERSON COUNTY)

CLELL I. MAYFIELD, being an attorney licensed to practice in the State of Alabama, in addition and to further clarify that affidavit given to Orzell Billingsley, Attorney at Law, on the 19th day of July, 1960, does hereby state that he was the attorney appointed by the Circuit Court of Jefferson County, Alabama, Tenth Judicial Circuit, to defend Charles Clarence Hamilton; that he was initially appointed as counsel for the defendant on January 4, 1957, for an indictment of burglary in the nighttime with intent to steal, which case, after several continuances, was nol prossed on April 24, 1957; that prior to April 24, 1957, on March 4, 1957, he was appointed as counsel for the defendant in a second indictment for burglary in the nighttime with intent to ravish; said attorney further states that he knew of the second indictment prior to its being returned by the Grand Jury, that he was aware of the indictment and the arraignment thereon, which occurred on March 1, 1957; that he considered himself as representing the defendant for the second case and that said arraignment on March 1, 1957, was done with his consent although he was not present at the arraignment; that said attorney further states at that particular time he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957. Said attorney further states that at the time of March 1, 1957, arraignment on said second indictment, he considered the arraignment a mere formality, since the same plea would be entered that had been entered on the first arraignment to the first indictment which occurred on the 4th day of January 1957, and that was his reason for not attending the second arraignment.

Clell I. Mayfield

Sworn to and subscribed before me this 29th day of July, 1960.

Robbie D. White
Notary Public

(SEAL)

[fol. 15] EXHIBIT B TO ANSWER

STATE OF ALABAMA)
JEFFERSON COUNTY)

CECIL M. DEASON, being a Deputy Circuit Solicitor for the Tenth Judicial Circuit of Jefferson County, Alabama, does state that he was the Deputy Circuit Solicitor who presecuted the case against Charles Clarence Hamilton in the Circuit Court of Jefferson County. Mr. Deason further states that he was assigned said case prior to the first arraignment on the first indictment and realized at that time that the defendant would have to re reindicted, since the case was an obvious one of burglary in the nighttime with intent to ravish rather than burglary in the niththtime with intent to steal. Mr. Deason further states that sometime before January 15, 1957, he told Mr. Mayfield that the defendant would have to be reindicted to include a second count on a charge of burglary in the nighttime with intent to ravish; that he further informed Mr. Mayfield that the Grand Jury would meet and would return an indictment containing the two counts and that Mr. Mayfield understood and knew that the case was being continued for the purpose of the Grand Jury returning another indictment and that after the Grand Jury had returned the second indictment, he informed Mr. Mayfield, the attorney representing the defendant, that a new indictment had been returned and that the defendant would be re-arraigned and the case set for trial. Thereafter the defendant was arraigned after Mr. Deason had the conversation with Mr. Mayfield with reference to the new indictment. Mr. Deason further states that on March 1, 1957, at the time of the second arraignment, he informed the court that Mr. Clell I, Mayfield was the attorney representing the defendant and knew that the arraignment was to be held on that date and due to the fact that Mr. Mayfield had been originally appointed by Judge Wheeler on the 4th day of January 1957, wherein the defendant at that time was only charged with burglary in the nighttime with intent to steal and realizing that the first case would be nol porssed after the trial on the second case

and realizing further that the record would have to show in order for Mr. Mayfield to receive his fee from the State of Alabama for representing the defendant, Mr. Deason requested Judge King to let the record reflect the fact that Mr. Mayfield had been formally appointed in the second case so there would be no question about his receiving his fee for representing the defendant and this occurred on March 4, 1957.

Cecil M. Deason

Sworn to and subscribed before me on this 29th day of July, 1960.

Robbie D. White
Notary Public

(SEAL)

16

[fol. 16] Filed Mar. 4, 1960. R. C. Dobson, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 1563-N

EX PARTE WILLIAM K. POWELL

MEMORANDUM OPINION AND JUDGMENT

This cause is now submitted upon the pleadings, the stipulations entered into by and between the parties, the oral testimony taken before the Court and the exhibits to that testimony, and the briefs and arguments of the parties. Upon this submission, this Court now makes the appropriate findings and conclusions, as required by the Rules of Federal Procedure, embodying the same in this memorandum.

The petitioner, William K. Powell, presently in custody of the State of Alabama in this district at Kilby Prison, Montgomery, Alabama, institutes this litigation by filing his petition in this Court, as authorized by §§ 2242 and 2254, Title 28 of the United States Code. Powell, in his petition, sought and was granted a hearing upon his application for writ of habeas corpus; this Court originally denied Powell's petition without a hearing, but later, and in accordance with the mandate of the Supreme Court of the United States, ordered that Powell's application for a hearing be granted. The matter was accordingly set for a full hearing, and a full hearing was held here in Montgomery, commencing at 9:00 a.m., January 19, 1960. Witnesses were subpoenaed and testified for both sides.

The basis for Powell's complaint is that his imprisonment and confinement by the State of Alabama, said imprisonment being for a period of ten years and having been imposed by the Circuit Court of Jefferson County, Alabama, on January 26, 1956, is in violation of his constitutional rights as a citizen, as guaranteed by the laws and by the Constitution of the United States. Specifically,

Powell alleges that his trial and conviction held in the Circuit Court (Tenth Judicial Circuit for the State of Alabama) of Jefferson County, Alabama, wherein he was charged with and convicted of the offense of robbery (Title 14, § 415, 1940 Code of Alabama, as amended), was in violation of his constitutional rights in the following respects:

(1) His conviction and subsequent imprisonment was in violation of due process of law, since the State of Alabama, acting through the Circuit Court of the Tenth Judicial Circuit, refused him his right to plead and be heard upon his plea of "not guilty by reason of insanity." [fol. 17] (2) That he was deprived of due process because he was not represented by counsel at his arraignment on the charges he was tried and convicted of. (This includes his contention that he was not represented by competent counsel.)

(3) That he was deprived of due process because of the failure of the State to have him present or permit him to be present in open court in all stages of the proceedings that resulted in his conviction and imprisonment.

(4) That he was denied a fair and impartial trial by the State of Alabama, which trial resulted in his conviction and imprisonment, by the admission of certain exhibits (gun, bullets, blackjack, gloves and mask) not used in or connected with the alleged offense, and that he was denied the right to present proper and vital testimony and evidence in support of his defense upon the trial of that case.

(5) That he was tried and convicted upon the uncorroborated and perjured testimony of an alleged accomplice.

(6) That he was subject to mental and physical coercion by the State of Alabama police authorities to the extent that he feared and failed to testify in his own defense.

(7) That the State of Alabama, acting through its agents, suppressed vital evidence during the trial resulting in his conviction.

(8) That he was denied a fair and impartial trial, since the Circuit Judge of the Tenth Judicial Circuit that pre-

sided at his trial failed and refused to submit the question of venue to the jury.

(9) That he was deprived of vital and true testimony because of the intimidation and threats made and directed toward certain defense witnesses by the State authorities.

To each of these contentions, separately and severally, the State of Alabama and/or the custodians of William K. Powell plead the general issue. It was understood by all concerned, and reflected by this Court's pre-trial order entered herein on January 7, 1960, that this plea of general issue included a specific denial as to each contention made by Powell and a general denial that the trial and the proceedings leading up to the trial, the conviction and confinement complained of by Powell, were not and are not in violation of any of his constitutional rights, as guaranteed him by the laws and the Constitution of the United States.

In September of 1955, the petitioner, William K. Powell, together with James R. Hatt, was arrested in a rooming house at Leeds, Alabama, by State law enforcement officers, one of whom was B. M. Dinkin of Jefferson County, Alabama. Both of these men were taken into custody, carried to Birmingham, Alabama, and shortly thereafter [fol. 18] indicted for violating Title 14, § 415 of the 1940 Code of Alabama, which section relates to the offense of robbery and provides that upon conviction, punishment shall be, at the discretion of the jury, by death or imprisonment for not less than ten years. In October of 1955, the Honorable L. Drew Redden, a practicing attorney of Birmingham, Alabama, was employed by Powell's family for the limited purpose of securing, if possible, an order of the court providing for a psychiatric examination of William K. Powell. Redden was not employed and did not undertake the general defense of William K. Powell as to the charge of robbery. Such a motion was filed, and the court on October 25, 1955, by consent of the circuit solicitor, ordered that Dr. Frank A. Kay, a specialist in mental diseases, examine Powell and report his findings to the court in writing. It is without dispute that Powell, prior to this time, had been a patient in several mental institutions and had received psychiatric

treatment from several such institutions. Prior to an examination being made by Dr. Kay and on November 23, 1955, Powell was arraigned in open court upon the indictment, and to said indictment entered a plea of not guilty. This Court specifically finds that at the time this plea was entered Powell was not represented by counsel. However, on the same day and during the same court appearance and shortly after Powell entered a formal plea of not guilty, the Circuit Court of Jefferson County, as provided by statute, appointed Robert Collins and Harold Bowron, Jr., two young attorneys of Birmingham, Alabama, to represent Powell in his case. Prior to the time these attorneys were appointed and while Powell was before the court, Powell requested the court, or attempted to request the court, to have an inquisition conducted as to his sanity. Such an inquisition is authorized by the Alabama criminal procedure and is set out in Chapter 21, Title 15 of the 1940 Code of Alabama, as amended. No action (in addition to that already taken) was taken by the court at this time on this request. Mr. Redden, upon learning of Powell's arraignment prior to the psychiatric examination being conducted by Dr. Kay, consulted with attorneys of the office of the circuit solicitor of Jefferson County, Alabama, and the solicitors agreed that the arraignment could be set aside of Powell's court-appointed attorneys for his general defense, Bowron and Collins, decided to take such action. Mr. Redden and the court-appointed attorneys, Bowron and Collins, conferred with Powell, and it was agreed by all concerned that issue would be joined on the plea of not guilty without any attempt being made to enter a formal plea of "not guilty by reason of insanity" and without any attempt being made to pursue the psychiatric examination that had been ordered by the court on October 25, 1955. This [fol. 19] Court further finds that sometime prior to the last of December, 1955, Dr. Kay attempted to perform the psychiatric examination, but Powell refused, and the matter was not pursued any further.

From the time of the arraignment and the appointment of attorneys Bowron and Collins, until the date of the trial commencing on January 25, 1956, this case was con-

tinued twice by order of the court and upon the motion of the circuit solicitor for Jefferson County. In the meantime, the defendant Hatt had employed private counsel, and his case was also continued twice. From the date of their appointment on November 23, 1955, until January 25, 1956, the court-appointed attorneys, Bowron and Collins, both of whom were young and inexperienced, conducted a very thorough and painstaking investigation into both the facts and the law that were applicable in Powell's case. Upon the trial of Powell's case, the co-defendant Hatt testified for the State, and William K. Powell was found guilty, by the jury, of robbery and was sentenced to the penitentiary of the State of Alabama for a term of ten years. The judgment pronuonced thereon was appealed and affirmed by the Alabama Appellate Courts.

As to the contentions now raised by petitioner Powell, this Court specifically finds that Powell was not represented by counsel on November 23, 1955, when he entered his formal plea of not guilty. However, on the same date and at the same court appearance, counsel was appointed for Powell and did effectively represent him from that point on throughout the trial. This Court further specifically finds that Powell was present in open court during all stages of the proceedings that resulted in his trial, conviction and present imprisonment. This Court further specifically finds that Powell was not deprived of any of his constitutional rights as guaranteed by the laws and the Constitution of the United States by the admission of certain exhibits (gun, bullets, blackjack, gloves and mask) which Powell claims were not used in or connected with the offense for which he was convicted in the State court. As a matter of fact, these exhibits were taken from the room Powell and Hatt were in, and were taken incidental to and at the time of their arrest by the State officers. At least part of these articles were of a type used by Powell and Hatt in the robbery for which they were convicted. If there was any error in the admission of this evidence, it was mere error in a point of law and should have been reviewed on the appeal of the matter. It was not such an error as is to be reviewed by

habeas corpus. See *Carruthers* v. *Reed*, 102 F. 2d 933, cert. den. 307 U.S. 643; *Brown* v. *Allen*, 344 U.S. 443; *Adams* v. *United States, etc.*, 317 U.S. 269.

This Court further finds that Powell was not convicted [fol. 20] upon the uncorroborated testimony of his accomplice Hatt; as a matter of fact, there was considerable corroboration of Hatt's testimony. Powell has failed in his attempt to show that Hatt's testimony was perjured, and he has failed in his attempt to show if Hatt did wilfully give any false testimony, that the falsity of same was known by the representatives for the State of Alabama. There is no basis in this case for applying the principle as set out in *Napue* v. *Illinois*, 360 U.S. 264.

As to Powell's contention that he feared and failed to testify in his own behalf during his trial and conviction for robbery, because of mental and physical coercion by the authorities for the State of Alabama, this Court finds that Powell's evidence in this respect completely fails. As his own attorney testified, his real reason for not taking the stand and testifying in his robbery case was his long criminal record. Powell's evidence fails in his attempt to show that the State of Alabama, acting through its agents, suppressed vital evidence and testimony, and also fails in his effort to show that he was deprived of vital testimony because of certain intimidating threats made and directed toward one of his witnesses by the name of Mrs. Annie Lee Hamby, formerly Mrs. L. A. Phillips. As a matter of fact, this witness testified before this Court that the reason she did not testify in the case against Powell, for which he was convicted, is that Deputy Sheriff Dinkin stated to her that Powell was going to get convicted and go to prison and that if the State authorities found out that she was financing Powell's defense and/or living with Powell, her government check would probably be stopped, and that the children would possibly be taken away from her. This Court in face of the denial by Dinkin, a reputable law enforcement officer of many years, cannot believe and accept the testimony of Mrs. Hamby.

In view of the findings by this Court as above set out, many of which are undisputed, the only real problem involved in this case, insofar as the law is concerned, is

that created by the fact that Powell was not represented by counsel at the time of his formal arraignment. The Alabama procedure, as set out in Title 15, § 318 of the 1940 Code of Alabama, provides that when a person is indicted for a capital offense and is without counsel, the court must appoint counsel for him if he is unable to employ counsel. There is no question but that an accused person in a capital case has a constitutional right to be represented by competent counsel. The Supreme Court of the United States left no doubt as to the fact that the Fourteenth Amendment included such a right and precluded an individual being deprived of this right by a state. See *Powell* v. *Alabama*, 1932, 287 U.S. 45. Counsel [fol. 21] now representing this petitioner vigorously contend that *Powell* v. *Alabama*, as above cited, stands for the principle that lack of counsel at arraignment, in and of itself, without any showing of prejudice, is sufficient to violate due process; counsel further vigorously insists that if such principle is not found to be true, then this petitioner was prejudiced by his lack of counsel upon his arraignment. The assignment of counsel to William K. Powell by the Circuit Court of Jefferson County, Alabama—even though it was after his formal plea of not guilty was entered was on the same date that the formal plea was entered and during the same court appearance that formal plea was entered, and was at such a time and under such circumstances as to permit his court-appointed counsel to give him effective aid in the preparation and presentation of his defense. Indeed, effective aid was not only "permitted" but given and received. This Court does not understand that *Powell* v. *Alabama*, supra, stands for the proposition that lack of counsel at arraignment, in and of itself, without some showing of prejudice, necessitates a holding that due process, within the meaning of the Fourteenth Amendment to the Constitution of the United States, was denied. As a matter of fact, that case by strong inference stands for the proposition that if counsel is assigned to an indigent defendant in a capital case at such a time and under such circumstances as to permit counsel to give the defendant effective aid in the preparation and trial of the case, then compliance or non-

compliance with formality is not the determining factor. The real determining factor is whether or not the assignment of counsel was under such circumstances and at such a time that effective aid could be and was available in both the preparation and the presentation of the available defense. Here, counsel were appointed at a time when necessary and before any rights of this petitioner were waived or lost. He was not prejudiced to any extent or degree by counsel being appointed shortly after his formal arraignment, but during the same court appearance. Such delay could "possibly" have been prejudicial to him, but as the Supreme Court of the United States stated in *Darcy* v. *Handy*, 351 U.S. 454:

> "Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. See also, *Buchalter* v. *New York*, 319 U.S. 427, 431; *Stroble* v. *California*, 343 U.S. 181, 198. Justice Holmes, speaking for a unanimous Court in *Holt* v. *United States*, [fol. 22] 218 U.S. 245, 251, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.'
>
> "We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced."

If this Court desired to speculate, it could very readily conclude that "opportunity" for prejudice was afforded in this case. For instance, Powell, before counsel was ap-

pointed, could have entered a plea of guilty instead of a plea of not guilty, and a motion to set such a plea of guilty aside could have been denied. Again, for instance, Powell, through his attorneys, could have attempted to enter the special plea of "not guilty by reason of insanity" and had such a motion denied. See *Morrell* v. *State*, 136 Ala. 44, 34 So. 208, and *Rohn* v. *State*, 186 Ala. 5, 65 So. 42. In either of those instances, the lack of counsel would have been prejudicial to Powell and would not have been a mere nonprejudicial lack of compliance with formality. To be more concise, this Court believes and holds that lack of compliance with formalities in court proceedings, which does not result in prejudice to the defendant, does not in and of itself result in a deprivation of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

As to the point petitioner raises that concerns the competency of his court-appointed attorneys (Bowron and Collins), this Court finds that each of these lawyers was a college graduate from an accredited law school, [illegible] admitted to the Alabama Bar and in good standing with that organization. While it is true that neither of these young lawyers had ever defended in a capital criminal case, it is also true that each of them was qualified to do so, and with those qualifications, they diligently applied themselves. Applying the principles of *MacKenna* v. *Ellis*, 1959, 5th Cir., 263 F. 2d 35, cert. den. 360 U.S. 935, and *United States ex rel. Weber* v. *Ragen*, 1949, 7 Cir., 176 F. 2d 579, cert. den. 338 U.S. 809, it must be concluded that Powell's evidence is insufficient as to this point.

As to petitioner's final point, i.e., his constitutional rights were violated because of the trial judge's failure to submit the question of venue to the petit jury, this Court finds that the Circuit Court of Jefferson County had jurisdiction to try, convict and sentence this petitioner. See Title 15, § 94, 1940 Code of Alabama. Also *Odell* v. *Hudspeth*, 189 F. 2d 300, cert. den. 342 U.S. 873. [fol. 23] After a careful study and analysis of all the evidence presented in this case, both oral testimony and written exhibits, this Court is of the firm conviction that the proceedings leading up to and the trial resulting in

the conviction and confinement of William K. Powell by the State of Alabama on January 26, 1956, were fair and in accord with "due process", and without his being deprived of any of his constitutional rights as a citizen as guaranteed by the laws and by the Constitution of the United States.

In accordance with the foregoing and for good cause shown, it is, therefore, the ORDER, JUDGMENT and DECREE of this Court that the petition for writ of habeas corpus, filed herein by William K. Powell, as authorized by [illegible] 2242 and 2254, Title 28, U.S.C.A., and by the mandate of the Supreme Court of the United States, be and the same is hereby denied.

Done, this the 4th day of March, 1960.

/s/ G. Donovan Johnson, Jr.
United States District Judge

[fol. 24]

IN THE
SUPREME COURT OF ALABAMA

SPECIAL TERM 1960

WEDNESDAY—AUGUST 3, 1960

• • • •

ORDER OF SUBMISSION ON BRIEFS ON PETITION AND ANSWER OF THE STATE OF ALABAMA THERETO—Aug. 3, 1960

6 Div. 604

(Title Omitted)

Come the parties by Attorneys, and submit this cause on briefs on the Petition for Leave to file a Petition for Writ of Error Coram Nobis and Answer of the State of Alabama thereto, for decision.

[*Livingston, C. J., Lawson, Stakely and Merrill, JJ., Sitting*]

[fol. 25] IN THE
SUPREME COURT OF THE STATE OF ALABAMA.
JUDICIAL DEPARTMENT

SPECIAL TERM 1960

6 Div. 604

EX PARTE CHARLES CLARENCE HAMILTON
IN RE CHARLES CLARENCE HAMILTON

v.

STATE OF ALABAMA

Petition for Leave to File Writ of Error Coram Nobis

OPINION—Aug. 15, 1960

LAWSON, JUSTICE.

Charles Clarence Hamilton was convicted in the Circuit Court of Jefferson County of the offense of breaking and entering an inhabited dwelling in the nighttime with intent to ravish. — 85, Title 14, Code 1940. We affirmed. [fol. 26] *Hamilton* v. *State* (Ala.), 116 So. 2d 906. Writ of certiorari was denied by the Supreme Court of the United States on June 27, 1960.—*Hamilton* v. *Alabama*, 80 S. Ct. 1638, 4 L. Ed. 2d 1737.

Hamilton has filed in this court a petition for leave to file an application for writ of error coram nobis in the Circuit Court of Jefferson County. Such is the proper procedure in view of the fact that the judgment of the Circuit Court of Jefferson County was affirmed here.—*Taylor* v. *Alabama*, 335 U. S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935; *Ex parte Williams*, 268 Ala. 535, 108 So. 2d 454, and cases cited.

In the petition presently before us, Hamilton asserts that the judgment under which he is being held is void in that his rights under "the laws and Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States of America" were violated in that he was not represented by counsel at the time he was arraigned and pleaded not guilty to the indictment upon which he was tried and convicted.

The petition, including the exhibits, the affidavit in support of the petition, the State's answer and affidavits supporting it show these circumstances:

Hamilton was first indicted on November 9, 1956. The indictment contained one count which charged burglary of an inhabited dwelling in the nighttime with intent to steal. He was arraigned on that indictment on January 4, 1957. He pleaded not guilty. He was represented by court-appointed counsel at arraignment when the plea was entered.

A second indictment against Hamilton was returned on February 12, 1957. It contained two counts. One count charged burglary of an inhabited dwelling in the [fol. 27] nighttime with intent to steal. The other count charged burglary of an inhabited dwelling in the nighttime with intent to ravish.

Both indictments related to the same incident, that is, to the breaking and entering of the inhabited dwelling of one Jacob C. Milko during the early hours of October 13, 1956.

The lawyer who had been appointed to defend Hamilton against the first indictment was advised by the State's prosecutor that the second indictment had been returned and that Hamilton would be "re-arraigned" and the case set for trial.

Hamilton was arraigned on the second indictment on March 1, 1957. He pleaded not guilty. Neither the lawyer who had been appointed to defend him against the first indictment nor any other lawyer appeared on his behalf at arraignment. The court did not appoint a lawyer to defend him against the second indictment until March 4, 1957, when the same lawyer was appointed who had been appointed to defend him against the first indictment.

Hamilton was brought to trial on the second indictment on April 23, 1957, when a jury found him guilty under the second count of the indictment and inflicted the death penalty. The first indictment was "nolle prossed" on April 24, 1957.

We hold that it is made to appear in this proceeding that Hamilton was not represented by counsel at the time he was arraigned on the indictment on which he was

subsequently tried and convicted. We are not here controlled by the minute and judgment entries, as was the situation on appeal from the judgment of conviction. *Hamilton* v. *State* (Ala.), 116 So. 2d 906.

Section 318, Title 15, Code 1940, as amended, provides in pertinent parts as follows: "When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defend- [fol. 28] ant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, . . ." We think this section places upon the trial court the responsibility of seeing that an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the indictment. We have found no Alabama case expressly so holding, but this has been the almost uniform practice of the circuit courts of this state for many years and the very purpose of the statute seems to dictate such action.

In *Powell* v. *United States*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, the Supreme Court of the United States held that in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that such duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. See *Reece* v. *Georgia*, 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77; *Tompkins* v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407.

The right to counsel is not a right confined to representation during a trial on the merits.—*Moore* v. *Michigan*, 355 U. S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167.

Hamilton should have been represented by counsel at the time of his arraignment. We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented.

[fol. 29] But does that showing, standing alone, afford prima facie just ground for us to authorize the filing in the lower court of the application for writ of error coram nobis? See *Johnson* v. *Williams*, 244 Ala. 391, 13 So. 2d 683, where we defined the standards to guide us in determining whether a petition for application to file a writ of error coram nobis in the trial court should be granted here. See also *Ex parte Taylor*, 335 U. S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935.

We think not and answer the question in the negative.

In a number of Federal Cases where the defendants were entitled to the benefit of counsel, it has been held that there was no abridgment of the right to counsel where the defendant was arraigned before counsel was appointed to represent him and the defendant pleaded not guilty. Even where the defendant pleaded guilty on arraignment the failure to appoint counsel has been said not to have been prejudicial where counsel was appointed immediately after arraignment and full opportunity was given to withdraw the plea or to take whatever steps were necessary or desirable without regard to what previously transpired.—*Counsel* v. *Cremmer*, 177 F. 2d 22, and cases cited; *Young* v. *United States*, 228 F. 2d 693.

The same rule seems to apply to those states where provision is made for appointment of counsel to represent defendants charged with non-capital offenses.

In *Canizio* v. *New York*, 327 U. S. 82, 66 S. Ct. 452, 90 L. Ed. 545, the Supreme Court of the United States treated the record before it as showing that Canizio was without counsel when he was arraigned and pleaded guilty in a New York court, and that the trial court failed to inform him of his right to counsel, but held that this defect was cured by his being represented by counsel [fol. 30] before and at sentence. It was observed by the court:

> "The attorney could have moved to withdraw the plea of guilty and the County Court of Kings County would have had the power to set aside the plea and let the petitioner stand trial . . . Petitioner's counsel probably thought it undesirable to do so, because this move might have jeopardized his chances for

> securing a low sentence . . . At any rate, whatever the reason petitioner's counsel did not move to withdraw the guilty plea. All of this demonstrated to the satisfaction of the court below even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally. We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense, he could have raised the question of a defect in the earlier part of the proceedings. Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel." (327 U. S., 85-86)

See *Gayes* v. *New York*, 332 U. S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962; *People* v. *Dolac*, 160 N. Y. S. 2d 911; *Chandler* v. *State*, 226 Ind. 648, 83 N. E. 2d 189; *State* v. *Swenson*, 242 Minn. 570, 65 N. W. 2d 657. Also see *Quicksall* v. *Michigan*, 339 U. S. 660, 70 S. Ct. 910, 94 L. Ed. 1188.

The rule of the cases which we have cited and quoted from above seems to apply to state capital cases as well. [fol. 31] In the opinion in *People* v. *Moore*, 405 Ill. 220, 89 N. E. 2d 731, decided by the Supreme Court of Illinois in 1950, it is shown that Moore was indicted for murder. The opinion does not show that murder was a capital offense in Illinois, but the law of that state so provided. Moore was convicted of murder and was sentenced to serve sixty years in prison. He appealed to the Supreme Court of Illinois, claiming that "his rights under *the statute* and under § I of the fourteenth amendment to the Federal constitution and Sections 2 and 9 of Article II of the Illinois constitution, Smith-Hurd Stats., were violated and because the court did not inquire as to whether he was able to employ counsel and did not appoint counsel to represent him prior to and during his arraignment." (Emphasis supplied) The opinion does not show which provision of law the court had reference to in simply using the words "the statute." However, it seems reasonable to assume that the court was referring to those provisions of the law of Illinois which required the appointment of

counsel to represent defendants charged with capital offenses. In affirming the judgment of conviction, the Illinois Supreme Court said:

> "The indictment consisted of two counts, each charging murder. Plaintiff in error was arraigned May 4, 1934, and was furnished with a copy of the indictment, together with a list of witnesses and jurors, at which time he pleaded not guilty. Three days later he appeared in court with counsel and on his motion the cause was continued. The record shows he was represented by counsel at each stage of the proceedings except at his arraignment when he pleaded not guilty. He was tried by the court after having waived a trial by jury.
>
> [fol. 32] "It will be noted that when plaintiff in error was arraigned he pleaded not guilty, so he was not prejudiced in any way if he did not have counsel at the time. In every other step of the proceedings he was shown to be represented by counsel. We find no error in the record before us and the judgment is accordingly affirmed."

The Supreme Court of the United States declined to review the opinion and judgment of the Supreme Court of Illinois.—*Moore* v. *Illinois*, 339 U.S. 924, 70 S. Ct. 614, 94 L. Ed. 1346.

It appears from the opinion prepared by Judge Barshay for the Kings County Court of New York in the case of *People* v. *Matera*, 132 N.Y.S. 2d 117, that Matera was convicted on June 18, 1931, of the crime of murder in the first degree and was sentenced to death. On his application for executive clemency, the death sentence was commuted to life imprisonment by Governor Franklin D. Roosevelt. Many years later Matera filed his application in the nature of a writ of error coram nobis to vacate and set aside the judgment of conviction. Among the grounds upon which Matera relied was the contention ". . . that on his arraignment on this indictment he was neither represented by counsel nor was he advised of his right of counsel; that he pleaded 'Not Guilty', . . ." Matera's motion or application for writ of error coram

nobis was denied. Such action of the court was based in part on the holding of the Supreme Court of the United States in *Canizio* v. *New York, supra.*

The case in point is that of *State* v. *Sullivan*, decided by the United States Circuit Court of Appeals for the 10th Circuit in 1955.—227 F. 2d 511. The Supreme Court of the United States declined to review the opinion and judgment of the Circuit Court.—350 U. S. 973, 76 S. Ct. 449, 100 L. Ed. 844.

[fol. 33] Verne A. Braasch and Melvin A. Sullivan were tried in a Utah state court upon the charge of murder. They were found guilty and sentenced to death. The judgment was affirmed—*State* v. *Braasch*, 119 Utah 450, 229 P. 2d 389; and certiorari was denied by the Supreme Court of the United States, 342 U. S. 910, 72 S. Ct. 304, 96 L. Ed. 681. Thereafter, they filed in the Supreme Court of Utah a pleading in which they sought a writ of habeas corpus. The writ was disallowed. On the next day Braasch and Sullivan instituted in a United States District Court in the State of Utah a habeas corpus proceeding wherein they alleged that their detention for execution was illegal and void because their rights under the Constitution of the United States had been violated. An amended complaint was subsequently filed. A motion was made to dismiss the habeas corpus proceedings for the reason that the amended complaint contained grounds of attack upon the judgment of the state court which had not been submitted to the state courts of Utah. The United States District Court after a hearing determined that certain grounds of the attack contained in the amended complaint had not been submitted to the state courts and that the submission of such issues to the state courts was an essential preliminary to the right to resort to habeas corpus in the United States court. Instead of dismissing the habeas corpus proceeding, however, the United States District Court retained jurisdiction thereof and gave Braasch and Sulivan time within which to institute in the state court an appropriate proceeding for the determination of such issues.—*Ex parte Sullivan*, 107 F. Supp. 514. A proceeding of habeas corpus was then filed in the Supreme Court of Utah, which was denied.—*Ex parte*

Sullivan, 123 Utah 28, 253 P. 2d 378. Certiorari was [fol. 34] denied by the Supreme Court of the United States.—*Braasch* v. *Utah,* 346 U. S. 861, 74 S. Ct. 75, 98 L. Ed. 373.

Thereafter the United States District Court, having retained jurisdiction of the habeas corpus proceedings, granted the writ of habeas corpus.—*In the Matter of the Application of Sullivan and Braasch,* 126 F. Supp. 564. The United States District Court predicated its action in granting the writ upon multiple grounds, one of which was a failure to furnish the petitioners counsel at the time of their arraignment upon the murder charge.

The State of Utah appealed to the United States Court of Appeals for the 10th Circuit. In an opinion by Judge Bratton reversing the District Court, it was said in part as follows:

> "The trial court rested in part the granting of its writ upon the failure to furnish petitioners counsel at the time of their arraignment upon the criminal charge. Petitioners did not have counsel at the time they were arraigned and entered their pleas of not guilty in the district court. But immediately thereafter, separate counsel were appointed for them, respectively. At no time after the appointment of counsel was any effort made to withdraw such pleas in order to attack the charge, or for any other purpose. And there is a complete failure of any showing that at any juncture of the criminal case were the petitioners denied any substantive or procedural right which might have been available to them except for such pleas. Petitioners did not suffer any proscription or disadvantage at any point in the criminal case [fol. 35] arising out of their pleas of not guilty, entered without the aid of counsel. And, while it is the general rule frequently reiterated that an accused is entitled to the benefit of counsel at every step of the proceedings, where one enters a plea of not guilty and is immediately thereafter furnished counsel for the preparation for trial, for the trial itself, and for the post-trial proceedings, the sentence imposed is not void for violating due process under the Fourteenth

Amendment or for impingement of fundamental rights. Council v. Clemmer, supra [177 F. 2d 22]." (227 F. 2d 511, 514)

As we have indicated, Hamilton seeks our authorization to file an application for writ of error coram nobis in the trial court by simply showing that he was without counsel at time of arraignment. There is no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty. Counsel was appointed for him three days after arraignment whose competence is not questioned and who asserts in an affidavit filed in this proceeding that "he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957." There is no suggestion that the not guilty plea interposed at the arraignment in absence of counsel prevented the filing of any other plea or motion.

In our opinion written on the appeal from the judgment of conviction (*Hamilton* v. *State* (Ala.), 116 So. 2d 906), we did not intend to convey the impression that we entertained the view that absence of counsel at the time of [fol. 36] arraignment in and of itself would vitiate the judgment of conviction. We simply did not take issue with the assertions made by counsel for Hamilton in that regard because the minute and judgment entries showed that Hamilton was represented by counsel at arraignment.

We are, of course, not unmindful of the severity of the punishment in this case, but we cannot say that a prima facie case for the filing of a petition for writ of error coram nobis has been made. We must, therefore, deny the petition.

PETITION DENIED.

Livingston, C. J., Stakely and Merrill, JJ., concur.

[fol. 37] IN THE
SUPREME COURT OF ALABAMA
SPECIAL TERM 1960

[MONDAY—AUGUST 15th, 1960]

* * * *

ORDER DENYING PETITION FOR LEAVE TO FILE A PETITION FOR WRIT OF ERROR CORAM NOBIS—August 15, 1960

(Title Omitted)

Comes the Petitioner, Charles Clarence Hamilton, by Attorneys, and The State of Alabama by its Attorney General, and the Petition for Leave to File a Petition for Writ of Error Coram Nobis to Jefferson Circuit Court and the Answer of The State of Alabama thereto, being submitted on briefs and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the Petition be and is hereby denied at the cost of the Petitioner, for which costs let execution issue accordingly.

[*Opinion by Lawson, J.*]

[*Livingston, C. J., Stakely, and Merrill, JJ., concur.*]

[fol. 38] (File Endorsement Omitted)

IN THE SUPREME COURT OF ALABAMA
SIXTH DIVISION—NO. 604

(Title Omitted)

PETITION FOR STAY OF EXECUTION—Filed Aug. 17, 1960

Comes now the appellant in the above-styled cause, by his attorneys, and petitions the Honorable Court to suspend execution of the sentence heretofore rendered in this case, and to stay execution of the Death Sentence heretofore set for August 19, 1960, and as grounds for said petition appellant shows the Honorable Court the following:—

1. That appellant was tried for and convicted of the crime of First Degree Burglary with intent to ravish by the Jefferson County, Alabama, Circuit Court on to-wit: the 24th day of April, 1957, and sentenced to be executed in the electric chair.

2. That on appeal, this Honorable Court affirmed the Judgment of the Circuit Court and on to-wit: the 21st day of January, 1960, denied his petition for rehearing.

3. Petitioner's application to the United States Supreme Court for Certiorari was denied on June 28, 1960, and application for Writ of Error Coram Nobis to the Supreme Court of the State of Alabama, was denied on to-wit: the 15th day of August, 1960.

4. Petitioner has been granted several stays of execution during the several stages of this matter, the last such stay to August 19, 1960, was granted by Honorable John Patterson, Governor of Alabama.

[fol. 39] 5. Petitioner needs a further Stay of Execution in order that he might seek a review of this Honorable Court's decision by the United States Supreme Court by certiorari or appeal.

WHEREFORE, petitioner prays that this Honorable Court will suspend the execution of sentence in this cause set for August 19, 1960, for a reasonable time, in order that he might pursue his remedy in the Federal Courts.

/s/ Orzell Billingsley, Jr.
Peter A. Hall
Attorneys for Petitioner-Appellant

Duly Sworn to by Orzell Billingsley, Jr.
Jurat Omitted in Printing

[fol. 40] IN THE
SUPREME COURT OF ALABAMA
SPECIAL TERM 1960

WEDNESDAY—AUGUST 17, 1960

• • • •

ORDER STAYING DATE OF EXECUTION OF AUGUST 19, 1960, PENDING APPLICATION BY PETITIONER TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND RESETTING DATE OF EXECUTION FOR FRIDAY, NOVEMBER 18, 1960—Aug. 17, 1960

(Title Omitted)

WHEREAS, on the 27th day of July, 1960, the Petitioner, Charles Clarence Hamilton, filed a Petition for Leave to File a Petition for Writ of Error Coram Nobis to Jefferson Circuit Court in the Supreme Court of Alabama, and said petition after being duly examined, understood and considered was denied by the Supreme Court of Alabama on August 15, 1960.

WHEREAS, the said Petitioner, Charles Clarence Hamilton, has this day [August 17, 1960] filed a petition in this Court to stay the execution of the death sentence set for Friday, August 19, 1960, by reprieve of Governor John M. Patterson issued July 28, 1960, pending application [fol. 41] by the Petitioner, Charles Clarence Hamilton to the Supreme Court of the United States for a Writ of Certiorari to review the judgment and order of the Supreme Court of Alabama of August 15, 1960.

NOW, THEREFORE, IT IS HEREBY ORDERED by the Supreme Court of Alabama, that the date of execution of the death sentence set for Friday, August 19, 1960, by reprieve of Governor John M. Patterson issued July 28, 1960, be and is hereby stayed, and that the date of execution of the death sentence be and is hereby reset for Friday, November 18, 1960, pending application by the Petitioner, Charles Clarence Hamilton, to the Supreme Court of the United States for a Writ of Certiorari to review the

judgment and order of the Supreme Court of Alabama of August 15, 1960.

[*Livingston, C. J., Lawson, Stakely, and Merrill, JJ., concur.*]

Clerk's Certificate to foregoing Transcript (Omitted in Printing)

[fol. 42] SUPREME COURT OF THE UNITED STATES

No. 533 Misc., October Term, 1960

CHARLES CLARENCE HAMILTON, PETITIONER,

vs.

ALABAMA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 9, 1961

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Alabama.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 640.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

January 9, 1961

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IN THE

Supreme Court of the United States

October Term, 1961

No. 32

CHARLES CLARENCE HAMILTON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

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IN THE

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STATE OF ALABAMA,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama is reported at —— Ala. ——, 122 So. 2d 602 and appears at R. 27. A prior opinion of the Supreme Court of Alabama in this case is reported at 270 Ala. 184, 116 So. 2d 906 and appears in Appendix A to Petitioner's brief, *infra* p. 1a. This Court's denial of certiorari on a prior petition seeking review of the judgment affirming the conviction is reported at 363 U.S. 852.

Jurisdiction

The judgment of the Supreme Court of Alabama denying leave to file a writ of error *coram nobis* was entered on Au-

gust 15, 1960, R. 36. By order of Mr. Justice Black entered on November 15, 1960, execution of the death sentence imposed upon the petitioner has been stayed pending issuance of the mandate by this Court. The jurisdiction of this Court is invoked pursuant to Title 28 Section 1257(3), petitioner having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

I

Whether, petitioner, sentenced to death for "burglary with intent to ravish", and not represented by court appointed counsel at arraignment as required by Alabama law, had to demonstrate disadvantage flowing from the denial to secure reversal of the conviction under the Fourteenth Amendment to the United States Constitution.

II

Whether petitioner, an indigent, ignorant, unstable Negro, completely untutored in the ways of the law, charged with a capital sex crime against a white woman in Alabama, in open conflict with his court appointed attorney during trial which otherwise was marked by petitioner's bungling efforts to defend himself at the Court's invitation, was deprived of due process secured by the Fourteenth Amendment by lack of court appointed counsel at arraignment, the appropriate time under Alabama law to raise certain defenses, and the only time prior to trial that the Court practicably could have made provision to reconcile counsel and client or appoint another attorney.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Code of Alabama 1940, Tit. 15, §318, which provides:

> *When counsel appointed for defendant in capital case.*—When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, and as compensation for said defense the attorney or attorneys so appointed shall be entitled in each case to a fee fixed by the judge presiding at said trial, which fee shall be not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, to be paid on the warrant of the state comptroller from the general funds in the state treasury. Said presiding judge in the case shall certify to the comptroller that "The attorney or attorneys appointed by the Court in the case of Alabama vs. ..... (name of defendant) has (or have) performed the service required of him (or them) in representing the said defendant and that the fee therefor has been fixed in the sum of ..... dollars (designate amount of fee)." Whereupon a warrant shall be drawn in favor of the attorney or attorneys upon the general funds of the treasury of the state of Alabama in payment therefor.

3. Code of Alabama 1940, Tit. 14, §85, which provides:

> *Burglary in the first degree.*—Any person who, in the nighttime, with intent to steal or to commit a felony, breaks into and enters any inhabited dwelling house, or any other house or building, which is occupied by any person lodged therein is guilty of burglary in the first degree, and shall on conviction be punished at the discretion of the jury, by death or by imprisonment in the penitentiary for not less than ten years.

Statement

This cause now is here for the second time and before recounting the facts in detail, petitioner first briefly relates the reason for successive applications. Petitioner was sentenced to death April 23, 1957 upon an indictment charging burglary with intent to ravish.[1] He appealed to the Alabama Supreme Court, alleging, among other things, that he had been denied due process of law secured by the Fourteenth Amendment in that he did not have effective representation of counsel at trial. See *Hamilton* v. *State*, 270 Ala. 184, 116 So. 2d 906 (1959), and see this petitioner's Petition for Writ of Certiorari, Oct. Term 1959, No. 1026 Misc. The Alabama Supreme Court affirmed, *Hamilton* v. *State, supra,* whereupon petitioner brought the cause here on certiorari (No. 1026 Misc. Oct. Term 1959) making the same constitutional allegations. One of petitioner's particular allegations here was that he did not have any counsel at all at arraignment, concerning which the Alabama Supreme Court had held on his appeal that "the right of accused to assistance of counsel includes the right to assistance from the time of arraignment until beginning and end of trial." 270 Ala. 188, 116 So. 2d 909

[1] The same indictment also charged burglary with intent to steal but petitioner was not found guilty of this count (R. 7).

(1959). Moreover, the Alabama Court acknowledged that this right was secured by the Fourteenth Amendment to the United States Constitution as well as the laws of the State of Alabama. But it held that "the principle is without application to the record before us," reading the record as demonstrating that petitioner indeed was represented by counsel at arraignment. Petitioner's effort to demonstrate that this was not so by reference to other portions of the record was rejected because state law precluded impeaching minute entries. 270 Ala. 188, 116 So. 2d 909 (1959).

The October, 1959 Term Petition for Writ of Certiorari had urged this Court to find as a constitutional fact that petitioner did *not* have counsel at arraignment, that this denial deprived him of due process of law, and that the conduct of the trial, in view of the representation by court appointed counsel, among other things, fell below Fourteenth Amendment due process requirements.[2] But Alabama argued in opposition that

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[2] The questions presented in the first petition were:

1. Whether indigent Negro petitioner, unable to employ counsel, having been indicted for a capital offense regarded with especial horror in this community (i.e., nighttime burglary with intent to steal and with intent to ravish a white woman) and having been incarcerated for approximately five months prior to arraignment, was deprived of due process of law as secured by the Fourteenth Amendment to the Constitution of the United States, by being arraigned and required to plead to said capital indictment without benefit of the advice, guidance, assistance, or presence of counsel in his behalf.

2. Whether petitioner was denied the fundamentals of a fair trial including effective assistance of counsel, contrary to the due process clause of the Fourteenth Amendment, by the trial of a capital case involving difficult legal and factual issues, in which conviction entirely depended upon inferences from circumstantial evidence that petitioner acted with a specific criminal intent, and in which punishment was determined in the discretion of the jury, where:

a. The attorney appointed to defend petitioner sought to withdraw from the case immediately before trial, and petitioner indi-

"[t]he burden is not on the State of Alabama to explain the fancied inconsistency as to why the minute entry of record shows that the defendant did have counsel at his arraignment and yet his trial counsel was apparently appointed three days later. Actually, the counsel in this particular case was appointed quite sometime prior to the official judgment entry to defend the petitioner on a previous indictment and remained assigned as counsel to the defendant throughout and including the day of arraignment on the second indictment. The two entries of judgment are not in conflict and the statement by the petitioner that the defendant was deprived of counsel at the time of his arraignment is pure conjecture on the part of the petitioner's counsel."

Respondent pointed out that

"The petitioner, however, still has available to him another remedy to attack the validity of the judgment entry in this case with extrinsic matter. That method is the writ of error coram nobis. See, for example, *Taylor* v. *Alabama*, 249 Ala. 667, 32 So. 2d 659, affirmed 335 U. S. 252. But the petitioner may not attack the validity of a judgment entry on appeal."

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cated to the court his dissatisfaction with the appointed attorney, all in the presence of the venire, and the trial judge denied the attorney's request to withdraw, without inquiring of him or petitioner concerning the reasons for or nature of their apparent incompatibility, but instead proceeded to trial.

b. The trial judge, under these circumstances, encouraged and permitted petitioner to attempt to supplement the appointed attorney's presentation, even though petitioner at the outset and thereafter plainly demonstrated that he was not versed in law or tutored in courtroom decorum, thereby necessitating repeated reprimands of defendant and lectures by the court in the presence of the jury, prior to and throughout the trial as petitioner clumsily endeavored to examine witnesses and argue points of law.

Brief in Opposition, pp. 5, 6. Certiorari was denied by this Court.

Petitioner now has pursued the suggested course via coram nobis and has amplified the record to demonstrate that in fact he did not have counsel at arraignment. But on *this* application, the Supreme Court of Alabama while reaffirming his right to counsel at arraignment again has rejected his plea:

> "Hamilton should have been represented by counsel at the time of his arraignment. We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented."

Nevertheless, because "[t]here [was] no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty," R. 35, the court rejected his petition.

Petitioner now returns to this Court on petition for writ of certiorari, granted on January 9, 1961. The Petition for Writ of Error Coram Nobis (R. 1), denial of which occasions the instant Petition alleged:

Petitioner first had been indicted November 9, 1956 for burglary in the night time with intent to steal. He was arraigned January 4, 1957, at which time counsel, Mr. Clell I. Mayfield, was appointed and entered a plea of not guilty. Trial was set for January 14, 1957, but was passed four times until April 24, 1957 when the case was nolle prossed on recommendation of the solicitor.

February 12, 1957, the grand jury indicted petitioner for burglary "with intent to ravish" and for burglary with intent to steal. March 1, 1957 petitioner was arraigned in this cause—the one now before this Court. He pleaded

not guilty. At this time no counsel had been appointed to defend on this indictment and no counsel was present. The affidavit of Mr. Mayfield, subsequently appointed to defend petitioner, appended to the petition for Writ of Error Coram Nobis, states:

> That said attorney states to the best of his knowledge, information and belief that he was not present at the arraignment of said Charles Clarence Hamilton on March 1, 1957. Said attorney further states that he did not advise or consult with said defendant at the arraignment of March 1, 1957 (R. 4).

March 4, 1957 Mr. Mayfield who was the court appointed attorney on the prior indictment (burglary with intent to steal) was appointed to defend petitioner on the two-count indictment of February 12, 1957.

The Petition for Writ of Error Coram Nobis then stated that on appeal the Court had held that the minute entry, which recited that petitioner had counsel at arraignment, could not be impeached by the Judge's bench notes. Here, however, the minute entry had been categorically disproved by counsel's affidavit. In view of the fact that the Court had agreed that petitioner possessed state law and Fourteenth Amendment rights to counsel at arraignment, the petition prayed for an order permitting filing of the Writ of Error Coram Nobis.

In opposition to the petition for Writ of Error Coram Nobis, the State alleged that the petition "lack[ed] a probability of truth," that petitioner was represented by counsel at the time of his arraignment on March 1, 1957, and that:

3. Non-representation of counsel at the time of arraignment is not per se a denial of due process. The petitioner must make some showing or allegation of in-

jury or prejudice to this cause. [See Exhibit C attached hereto and made a part hereof.][1]

4. The petitioner has alleged no showing of prejudice and such affirmatively appears of record (R. 12).

An affidavit by Mr. Mayfield submitted by the State asserted that he had been appointed to represent Hamilton on the prior indictment (for burglary with intent to steal) later nolle prossed; that his appointment on the indictment charging burglary with intent to ravish and burglary with intent to steal was not made until three days after it was handed down; that he "knew of the second indictment prior to its being returned by the Grand Jury", was "aware of" the second indictment and arraignment; "considered himself" as representing defendant, and that the arraignment "was done with his consent although he was not present." Furthermore, "he would not have entered any different plea." He considered "the arraignment a mere formality since the same plea would be entered that had been entered on the first arraignment to the first indictment which occurred on the 4th day of January, 1957, and that was his reason for not attending the second arraignment" (R. 13).

The Deputy Circuit Solicitor who prosecuted the case deposed (R. 14) that he spoke with Mr. Mayfield informing him that a new indictment was being procured and later told him that the new two count indictment had been returned and that defendant would be rearraigned. None of the affidavits indicates whether Mr. Mayfield saw this indictment. The prosecutor gave as reason for the appoint-

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[1] This exhibit is the opinion of the United States District Court for the District of Alabama, Northern Division, in *Ex Parte William Powell*, Civil Action No. 1563-N March 4, 1960, in which the petitioner in that case raised the issue of right to counsel. That case now has been reversed on the ground of state suppression of evidence. 287 F. 2d 275 (5th Cir. 1961).

ment of March 4, that it was necessary to assure that the lawyer would receive a fee for the second case:

> . . . realizing further that the record would have to show in order for Mr. Mayfield to receive his fee from the State of Alabama for representing the defendant, Mr. Deason requested Judge King to let the record reflect the fact that Mr. Mayfield had been formally appointed in the second case so there would be no question about his receiving his fee for representing the defendant and this occurred on March 4, 1957 (R. 5).

The Supreme Court of Alabama, held that petitioner had followed the proper procedure (R. 27), but denied the petition for leave to file an application for writ of error coram nobis. It found that Hamilton was not represented by counsel at the time of the second arraignment:

> We hold that it is made to appear in this proceeding that Hamilton was not represented by counsel at the time he was arraigned on the indictment on which he was subsequently tried and convicted. We are not here controlled by the minute and judgment entries, as was the situation on appeal from the judgment of conviction—*Hamilton* v. *State* (Ala.), 116 So. 2d 906 (R. 28-29).

Alabama law "places upon the trial court the responsibility of seeing that an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the indictment" (R. 29). Moreover,

> Hamilton should have been represented by counsel at the time of his arraignment. We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented (R. 29).

But, the petition for leave to file application for Writ of Error Coram Nobis was denied on the ground that Hamilton did not show that he had been prejudiced by this lack of representation (R. 30). The Court concluded:

> We are, of course, not unmindful of the severity of the punishment in this case, but we cannot say that a prima facie case for the filing of a petition for writ of error coram nobis has been made. We must, therefore, deny the petition (R. 35).

The record now brought here on certiorari from denial of leave to file an application for Writ of Error Coram Nobis amplifies the record brought here earlier which this Court may judicially notice, *United States* v. *Pink*, 315 U. S. 203, 216; *United States* v. *California Co-Op Canneries*, 279 U. S. 553, 555; *Bienville Water Supply Co.* v. *City of Mobile*, 186 U. S. 212, 217, as might the Supreme Court of Alabama, *Ex parte Seals*, —— Ala. ——, 126 So. 2d 474 (1961); *Ex parte Powell*, 261 Ala. 246, 73 So. 2d 558 (1954); *Ex parte Burns*, 247 Ala. 98, 22 So. 2d 517 (1945).

At the first trial the evidence indicated that on the night of October 12, 1956 (R.* 55, 77)[4] and on the morning of October 13, 1956 (R.* 21, 39) in Ensley, Alabama, petitioner,[5] a Negro, was found in the bedroom of Mrs. Mary

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[4] R.* refers to the Record filed with the petition for writ of certiorari, No. 1026 Misc., October Term, 1959.

[5] According to a report of the State Board of Pardons and Paroles, petitioner left school after reaching the eleventh grade in 1950. Following a dishonorable discharge in 1956 he did only casual or part time work. The State Board report concluded that he and his family were indigent (R.* 8). Affidavits of his mother and cousin urge that the petitioner was mentally ill (R.* 9, 10) and that court appointed counsel had been told that the family believed petitioner was not sane (R.* 11). Counsel believed, however, that petitioner was sane, although, following trial, the affidavit relates, counsel concluded that petitioner had demonstrated that he was not sane (R.* 11).

Giangrosso (R.* 26, 56, 71) by her granddaughter's husband (R.* 26). The grandmother was elderly, ill, almost blind, and spoke indistinctly with a broken accent (R.* 24). Petitioner testified he could not understand her (R.* 67, 70). His testimony, in fact, was incoherent, but was generally, that he thought she had summoned him to the room (R.* 56), possibly because someone had robbed her (R.* 57). The grandchildren called the police (R.* 27). There was some testimony concerning the condition of the lock, although it was not demonstrated that it had been broken (R.* 42). While the windows and doors had been secured prior to retiring, the door from the porch to the grandmother's bedroom was open (R.* 37).

There was testimony that petitioner was indecently exposed (R.* 35), but Mrs. Giangrosso (the alleged intended victim of rape) did not testify, although counsel for petitioner (the same man who had been appointed on March 4, and had not attended the arraignment) called for her testimony during the trial; since she had not been subpoenaed, she did not testify and he made no effort to secure her attendance (R.* 42, 43).

There was no evidence that any rape, violence, or physical injury of any kind occurred to Mrs. Giangrosso or anyone else, nor evidence that petitioner had any weapons, burglary tools, or the like.

The trial was brief. Taking of testimony commenced at 11:00 and the trial terminated at 4:10 P.M., with an hour and forty minutes recess for lunch (R.* 19, 54, 85).

The trial was marked by constant clashes between petitioner and his court appointed counsel and between petitioner and the court, with petitioner challenging the right of the court to try him on the second indictment and insisting that he did not want the court-appointed counsel

to represent him. As the trial commenced, the Court admonished petitioner: "Let me say this to you: You are represented by counsel. You are not going to disturb this court. I have tried to be courteous to you and explain the law to you, but you are not going to wrangle. You just be quiet." Thereupon, petitioner disavowed his counsel:

> The Defendant: Before you go on, let me say this: This lawyer is not my lawyer. He was appointed by the Court.
>
> The Court: The law provides the Court appoint you counsel. You were appointed the lawyer so that you may get your constitutional rights (R.* 16).

At this point at the beginning of trial the court-appointed attorney requested permission to withdraw; this was denied (R.* 16)—all in the presence of the jury.

Apart from court-appointed counsel petitioner had no other lawyer. The Court provided that petitioner might conduct examinations of witnesses himself after counsel completed examination (R.* 18).

Petitioner's first effort at cross-examination came at the Court's renewed invitation: "Hamilton, due to the fact you stated you did not employ Mr. Mayfield as your attorney, I told you that, after examination by the state and Mr. Mayfield, if you thought of any additional questions you wanted to ask, I would allow it. Can you think of any additional questions to ask this lady?" (R.* 31). Petitioner, apparently addressing himself to the charge of intent to steal, asked, in part "would they say I intended to steal, with my clothes off" (R.* 32). There was an objection to which the Court stated "You may not argue or harass the witness." The Court then inquired "do you have any further questions?" Petitioner replied "No, sir" (R.* 32).

Following testimony of another prosecution witness, the Court addressed petitioner, "Now, Hamilton, do you think of any additional questions, in view of what was stated before, that should be asked this gentleman?" (R.* 37). Petitioner replied "There is nothing I could ask, you would allow." The Court stated "In other words, you just want to ask him why the Grand Jury did so and so?" Petitioner stated "There is nothing I could, that wouldn't show reflection on him." The Court replied "You ask it." Petitioner stated: "There is one of them, right there (indicating)." The Court then stated "I told you you can't ask him about the Grand Jury doing something. If you have other questions, you may ask them" (R.* 37-38). Petitioner stated, "No questions, sir" (R.* 38).

Similar colloquies between the court and petitioner occurred following testimony of Police Officer Cope (R.* 40) and Police Officer Boyd (R.* 42).

Court-appointed counsel after inquiring whether Mrs. Giangrosso was in court, calling her and, upon no response abandoning the thought of having her testify, called the witness, Marisette (R.* 43). He described having spent time with petitioner on the evening of the alleged offense until sometime between 10:00 and midnight. The state cross-examined, and then the Court stated to petitioner, "Hamilton, when these witnesses are put up here on your behalf, if you want to ask them anything, you may do so."

> The Defendant: The defendant will make his own testimony.
>
> The Court: Do you want to ask this last witness anything?
>
> The Defendant: No, sir (R.* 48).

The trial concluded with a lengthy charge to the jury which nowhere defined "intent to ravish", and to which no

objections were taken. Petitioner himself argued to the jury, but said he did not understand the charge. The verdict was guilty and petitioner was sentenced to death.

Summary of Argument

Petitioner was denied due process of law secured by the Fourteenth Amendment because he was not represented by counsel at arraignment on a capital charge; i.e., burglary with intent to ravish. This Court has without qualification held that in a capital case the accused requires the guiding hand of counsel at every step in the proceeding against him. Alabama itself has held that this much is required by its own law and by the Fourteenth Amendment. The refusal to issue the writ of error coram nobis on the alleged ground that petitioner did not demonstrate "disadvantage" would introduce a corrosive influence into the settled rule which has been the view of this Court since *Powell* v. *Alabama*. The appointment and physical presence of a lawyer at arraignment and other judicial proceedings in a capital case is the minimum objective procedural protection due to a defendant which the courts can enforce.

But, even if, *arguendo*, disadvantage need be shown it has been demonstrated fully. It is prejudicial per se not to have counsel at arraignment in a capital case involving difficult and subtle legal questions of, among other things, criminal intent, which turn on inferences from circumstantial evidence. Arraignment was the only point at which petitioner had an absolute right to raise such defenses as jury discrimination and insanity and an appropriate time perhaps to negotiate a plea to a lesser charge if that were to be deemed advisable. Beyond this, the trial was marked by clashes between petitioner and his court appointed counsel, neither of whom wanted this lawyer-client rela-

tionship and so expressed themselves before the jury. Petitioner was chastised by the court before the jury and at the court's invitation repeatedly made bungling efforts to examine witness and argue points of law. Obvious questions concerning the sufficiency and the indictment of the charge were not raised. A crucial witness, the possible subject of the intent to ravish, was not subpoenaed by defense counsel, who merely called for her in the courtroom and when she did not appear abandoned the thought of having her testify.

But even more fundamental, the theory by which respondent and the Court below expiate the failure to provide court-appointed counsel at arraignment is that any failures which might have occurred then because of the absence of counsel were curable by subsequent representation at the trial. This justification simply does not apply where the trial, considered as a whole, including representation afforded at it, was so grossly damaging and unfair to whatever rights petitioner might have protected even at the trial itself. Also, earlier exposure of petitioner to counsel in the presence of the Court at arraignment well might have led to their reconciliation or the appointment of new counsel prior to the trial in chief.

ARGUMENT

I.

The right of counsel during all stages of criminal proceedings where the death penalty may be imposed is so fundamental that it should not be limited at any point by a rule requiring demonstration of the amount of prejudice resulting from denial of representation at a particular stage.

Petitioner, an indigent, not represented by counsel when arraigned on a capital indictment, was tried, convicted, and sentenced to death by electrocution. Lack of representation at arraignment violated Alabama law and the "almost uniform" practice in the Alabama circuit courts. The court below at —— Ala. ——, 122 So. 2d 602, 603-4 held:

> *We hold that it is made to appear in this proceeding that Hamilton was not represented by counsel at the time he was arraigned on the indictment on which he was subsequently tried and convicted.* We are not here controlled by the minute and judgment entries, as was the situation on appeal from the judgment of conviction.—*Hamilton* v. *State, Ala.,* 116 So. 2d 906.

Section 318, Title 15, Code 1940, as amended, provides in pertinent parts as follows: "When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, . . . " *We think this section places upon the trial court the responsibility of seeing that an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the in-*

> *dictment.* We have found no Alabama case expressly so holding, but this has been the almost uniform practice of the circuit courts of this state for many years and the very purpose of the statute seems to dictate such action.
>
> • • • • •
>
> *Hamilton should have been represented by counsel at the time of his arraignment.* We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented. (Emphasis supplied.)

Notwithstanding this holding and that he had no counsel, his petition for a *coram nobis* hearing was rejected on the ground that Hamilton was not "disadvantaged":

> There is no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty. Counsel was appointed for him three days after arraignment whose competence is not questioned and who asserts in an affidavit filed in this proceeding that "he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957." There is no suggestion that the not guilty plea interposed at the arraignment in absence of counsel prevented the filing of any other plea or motion. (122 So. 2d 602, 607).

The Court explained away its earlier opinion on appeal which had seemed to agree without qualification that denial of counsel at arraignment denies rights protected by federal and state law.[6] Instead it required petitioner to show how

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[6] In the earlier opinion the Supreme Court of Alabama had said at 270 Ala. 184, 188, 116 So. 2d 906, 909:

> Appellant insists that in capital cases where defendant is unable to employ counsel the court must appoint effective coun-

he was harmed by denial of counsel, thus qualifying the right to counsel in a capital case.

While some procedural protections (including the right to counsel in non-capital cases) have indeed been qualified by considerations of this kind, cf. *Betts* v. *Brady*, 316 U. S. 455, heretofore the right to counsel at all stages of capital cases has been regarded as absolute. In a capital case the accused "requires the guiding hand of counsel at every step in the proceeding against him" and the need for counsel is so "vital and imperative" that failure to afford counsel offends due process. *Powell* v. *Alabama*, 287 U. S. 45. Only "when a crime subject to capital punishment is not involved," some Justices have held, does "each case depend on its own facts." *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441. This view was only recently once more expounded by Mr. Justice Stewart in *Spano* v. *New York*, 360 U. S. 315, 327:

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sel for him, and failure to do so denied defendant a fair trial and violates the equal protection and due process clause of the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the State of Alabama; and the right of accused to assistance of counsel includes the right to assistance from time of arraignment until beginning and end of the trial.

We have no quarrel with the above insistence of counsel for appellant, but the principle is without application to the record before us.

In the opinion denying the *coram nobis* petition the Court said at 122 So. 2d 602, 607:

In the opinion written on the appeal from the judgment of conviction (Hamilton v. State (Ala.), 116 So. 2d 906) we did not intend to convey the impression that we entertained the view that absence of counsel at the time of arraignment in and of itself would vitiate the judgment of conviction. We simply did not take issue with the assertions made by counsel for Hamilton in that regard because the minute and judgments entries showed that Hamilton was represented by counsel at arraignment.

> Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. *At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death penalty may be imposed. Powell* v. *Alabama* [*supra*]. (Emphasis supplied.)

This Court frequently has considered the principles governing the Fourteenth Amendment protection of the right to counsel[7] and has made basic distinctions between capital and non-capital cases. While non-capital cases have turned on the particular facts of each case and special circumstances regarding disadvantage to the uncounselled defendant, this rule has not been applied in capital cases. See, *Betts* v. *Brady, supra*: *Bute* v. *Illinois*, 333 U. S. 640, 676; *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; *Palmer* v. *Ashe*, 342 U. S. 134, 135; *Tomkins* v. *Missouri*, 323 U. S. 485, 487.

The importance of representation during all stages of a capital prosecution is manifest, *Powell* v. *Alabama, supra; Moore* v. *Michigan, supra;* the "guiding hand of counsel" should be offered before an accused is required to plead to an indictment. *Williams* v. *Kaiser*, 323 U. S. 471, 475; *House* v. *Mayo*, 324 U. S. 42, 45-46; and "arraignment is too important a step in a criminal proceeding to give . . . wholly inadequate representation," *Von Moltke* v. *Gillies*, 332 U. S. 708, 723.

The court below cited several decisions in support of its conclusion. Some must be distinguished because they involved only non-capital offenses, see, e.g., *Canizio* v. *New York*, 327 U. S. 82.[8] Moreover, unlike *Canizio, supra*, de-

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[7] Many of the cases are collected in *Moore* v. *Michigan*, 355 U. S. 155, 159, n. 7, and *Cash* v. *Culver*, 358 U. S. 633, 636, n. 6.

nial of counsel here violated Alabama's own state law.[8] The other state and lower federal precedents cited below, see, e.g., *People* v. *Moore*, 405 Ill. 220, 89 N. E. 2d 734 (1950); *People* v. *Matera*, 132 N. Y. S. 2d 117 (1954), *Council* v. *Clemmer*, 177 F. 2d 22 (D. C. Cir. 1949), to the extent they seem to support the court's view, are at variance with the rulings of this Court and, if recognized, would introduce a corrosive influence into the settled, salutary rule which has been the view of this Court since *Powell*.

The holding below extends the *Betts* v. *Brady, supra* limitations on right to counsel to the capital area. Without mentioning that non-capital case, the court below applied its theory, making the right in this capital case depend on analysis of the unfairness resulting from lack of counsel. Similarly, without mentioning *Crooker* v. *California*, 357 U. S. 433, the court below applied to arraignment (*following* indictment) *Crooker's* view that the right to counsel *prior* to indictment depends upon circumstances. In *Spano* v. *New York*, 360 U. S. 315, one issue was whether *Crooker* should govern following indictment; while the majority found it unnecessary to reach this issue, several Justices concurred in the view that deprivation of counsel *after indictment* denied due process, thereby invalidating a confession and conviction. See 360 U. S. at 324, 326.

Occasionally, but rarely, when an attorney is actually present, a criminal defendant can demonstrate qualitative unfairness of ineffective representation. Cf. *Von Molke* v.

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[8] Also: *People* v. *Dolac*, 160 N. Y. S. 2d 911 (1957) (non-capital). See *State* v. *Swenson*, 242 Minn. 570, 65 N. W. 2d 657 (1954) (lawyer actually present at arraignment); *State* v. *Sullivan*, 227 F. 2d 511 (10th Cir. 1955) (counsel denied prior to indictment), both capital cases.

[9] Apparently only the dissenting Justices regarded the procedure as violating state law in *Canizio*, 327 U. S. 82, 89.

Gillies, 332 U. S. 708; *Glasser* v. *United States*, 315 U. S. 60, 69-70, and *Powell* v. *Alabama*, *supra*. But unless qualitative ineffectiveness is so flagrant that the trial is a sham efforts to demonstrate that an attorney did his job poorly are futile. See, for example, *United States* v. *Ragen*, 166 F. 2d 976, 980 (7th Cir. 1948); *Sweet* v. *Howard*, 155 F. 2d 715, 717 (7th Cir. 1946) (illiteracy of counsel, if proven, still insufficient to establish incompetency). Alabama's rule is equally strict. *Arrington* v. *State*, 253 Ala. 178, 43 So. 2d 644, 646 (1949). Precisely because to show qualitative inadequacy of representation is so difficult as to be virtually impossible, it is all the more important to require as a minimum objectively determinable procedural protection, that at least *some* attorney be appointed and present to counsel defendant at every stage of criminal proceedings which may culminate in the imposition of a death penalty.

The State seems to regard appointment of counsel on the second indictment (which added the charge, with "intent to ravish," upon which petitioner was convicted) as a "mere formality." The affidavit by the lawyer appointed to defend Hamilton against a prior indictment and appointed again after the arraignment in question, stated his opinion that the arraignment was a "mere formality" (R. 13). The deputy solicitor stated that following arraignment he requested the fresh appointment only to assure that the defense attorney would receive his fee from the State (R. 14). But the fresh indictment obviously was not a mere formality; it charged a wholly different and more reprehensible crime.

Neither the retrospective opinion by defense counsel that nothing different would have occurred if counsel had been appointed before and been present at, arraignment, nor the prosecutor's explanation about his concern over his ad-

versary's fee,[10] changes the fact that counsel and Court did not follow Alabama law as interpreted by its courts and the "almost uniform" practice, which required that the Court see that "an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the indictment" —— Ala. ——, 122 So. 2d 602, 603-4). In any event, what lawyer can say with assurance what he *would have done* if he had been present in court on an occasion as important as arraignment in a capital case. In a capital case, when a lawyer's diligence and devotion may save his client's life at any stage of the proceedings, no stage properly may be regarded as a "mere formality." As the opinion of the Court held in *Reynolds* v. *Cochran*, 365 U. S. 525, 532-533.

> " . . . even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."[11]

But here no lawyer had been appointed at the time of arraignment and made responsible for exercising wholehearted diligence and devotion. Hamilton did not have the benefit of counsel prior to entry of the plea.

The appointment and physical presence of a lawyer at arraignment and other judicial proceedings in a capital case is the minimum procedural protection due to a defendant which the courts can enforce. The ruling below to the contrary again demonstrates the way that "illegitimate and unconstitutional practices get their first footing . . .

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[10] Under Ala. Code, Tit. 15, §318, *supra*, defense counsel is entitled to a fee of $50 to $100, to be fixed by the court.

[11] And see Knapp, "Why Argue an Appeal? If So, How," 14 The Record 415, 426 (November 1959) in which the author writes "And don't miss any opportunity for communication between you and the Court. If there is a long calendar call, don't send a junior to answer it. Be there yourself."

by silent approaches and slight deviations from legal modes of procedure" in hard cases involving "the obnoxious thing in its mildest and least repulsive form," *Boyd* v. *United States*, 116 U. S. 616, 635. If counsel may be dispensed with at arraignment in a capital case with the rationalization that nothing different would have occurred had he been present, can counsel's presence next be dispensed with during part of the trial on the ground that defendant was not flagrantly over-reached in his absence, or during the charge to the jury on the same theory?

The right to counsel in a capital case is but one of the areas covered by Fourteenth Amendment due process in which a rule placing on the defendant the burden of showing prejudice would lead to erosion of basic standards of integrity in the administration of criminal justice. For example, the right not to have Negroes systematically excluded from a jury which tries a Negro defendant is never qualified by demanding that he demonstrate prejudice from having been tried by the all-white jury. Indeed, where a Negro defendant has been indicted by a *grand jury* constituted in a racially discriminatory manner, and later convicted by a petit jury concerning which no such charge is even made, the conviction will be reversed. *Cassell* v. *Texas*, 339 U. S. 282; and see Justice Jackson's dissenting opinion at 298, 303. This Court continues to adhere to this position. *Eubanks* v. *Louisiana*, 356 U. S. 584. In cases of forced confessions defendants need not show that but for the coerced confession which was introduced into evidence, they would have been acquitted. *Blackburn* v. *Alabama*, 361 U. S. 199. As this Court held in that case:

> In cases involving involuntary confessions this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a convic-

> tion, wrings a confession out of an accused against his will. 361 U. S. 206-207.

Similarly, this Court has held that an accused may not be tried by a tribunal financially interested in the outcome, *Tumey* v. *Ohio*, 273 U. S. 510, 535, even though there was no demonstration that the financial interest played a role in the decision and the evidence clearly indicated guilt. Chief Justice Taft wrote "No matter what the evidence was against him, he had the right to have an impartial jury." And cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 116; *Patton* v. *United States*, 281 U. S. 276, 292.

The right to counsel at all stages of a case in which the death penalty can be (and was) inflicted is the same kind of bedrock right. The Court's opinion in *Glasser* v. *United States*, 315 U. S. 60, 76, while dealing with a different aspect of the denial of counsel, is nonetheless apposite:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

II.

Even if, *arguendo*, a showing of "disadvantage" is required, such amply appears of record.

Petitioner's claim that he has been denied effective assistance of counsel in this capital case in violation of the Fourteenth Amendment is sustained even under a view which requires that there be some demonstration of disadvantage. The claim was made in petitioner's October 1959 Term petition that he was denied effective assistance of counsel in that he did not have a lawyer at arraignment; that he was denied such assistance in that his was a capital

case involving difficult legal and factual issues in which conviction entirely depended upon inferences from circumstantial evidence that petitioner acted with specific criminal intent; and in which punishment was determined in the discretion of the jury; that court appointed counsel sought to withdraw from the case immediately before trial; that petitioner indicated to the court his dissatisfaction with the appointed attorney, and the trial judge denied the request to withdraw without inquiring concerning the reasons for the incompatibility; that the trial judge encouraged petitioner to attempt to supplement his appointed lawyer's presentation even though petitioner demonstrated that he was unversed in law and courtroom decorum, necessitating repeated reprimands in the presence of the jury; that petitioner clumsily endeavored to examine witnesses and argue points of law.[12]

The coram nobis petition was filed following denial of the first petition for writ of certiorari in an effort to elucidate a factual aspect of the proceedings concerning which the parties disagreed (although petitioner contended the record was utterly clear), *i.e.* whether court appointed counsel appeared at arraignment on the two-count indictment charging burglary with intent to steal and "ravish." The coram nobis aspect of the case was "a part of the proceeding in the case to which it refer[red] . . ." *Smith* v. *State*, 245 Ala. 161, 16 So. 2d 315, 316 (1944), or, as this Court has held is "a step in the criminal case, not like habeas corpus where relief is sought in a separate case and record . . ." *United States* v. *Morgan*, 346 U. S. 102, 105, note 4. Consonant with this view, Alabama repeatedly has noticed the record on appeal when it has passed on coram nobis applications. *Ex parte Seals*, —— Ala. ——, 126 So. 2d

[12] See Petition for Writ of Certiorari, October Term 1959, No. 1026, p. 1 (Questions Presented).

474 (1961); *Ex parte Fennell*, 261 Ala. 246, 73 So. 2d 558 (1954); *Ex parte Burns*, 247 Ala. 98, 22 So. 2d 517 (1945); *Johnson* v. *Williams*, 244 Ala. 391, 13 So. 2d 683 (1943); *Ex parte Taylor*, 249 Ala. 667, 32 So. 2d 659 (1947); affirmed 335 U. S. 252. In the latter case, this Court held:

> "The Supreme Court of Alabama . . . read this petition and these affidavits, as we must read them, in close connection with the entire record already made in the case" (at 264-265).

But apart from the customary Alabama practice of reading coram nobis petitions in light of the entire record, respondent itself invoked consideration of the record as a whole and the question of prejudice by its answer to the coram nobis petition:

> "3. Non-representation of counsel at the time of arraignment is not per se a denial of due process. The petitioner must make some showing or allegation of injury or prejudice to this case . . .
>
> 4. The petitioner has alleged no showing of prejudice *and such affirmatively appears of record*" (R. 12). (Emphasis supplied.)

This Court too, apart from the question of disadvantage brought here on this second petition, may examine the question in the light of the full record filed in the October 1959 Term which may be noticed. *United States* v. *Pink*, 315 U. S. 203, 216; *United States* v. *California Co-Op Canneries*, 279 U. S. 553, 555; *Bienville Water Supply Co.* v. *City of Mobile*, 186 U. S. 212, 217, as Alabama may have noticed it. See cases cited *supra*.

As stated in *Reece* v. *Georgia*, 350 U. S. 85, 87:

> "We have jurisdiction to consider all of the substantive federal questions determined in the earlier stages of the litigation . . ."

See also *Urie* v. *Thompson*, 337 U. S. 163.

On appeal the right to effective assistance of counsel issue was treated and disposed of by the Supreme Court of Alabama in sweeping terms:

> Appellant insists that in capital cases where defendant is unable to employ counsel the court must appoint effective counsel for him, and failure to do so denied defendant a fair trial and violates the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the State of Alabama; and that right of accused to assistance of counsel includes the right to assistance from time of arraignment until beginning and end of the trial. 270 Ala. 188, 116 So. 2d 909.

While agreeing with petitioner in theory the decision was adverse to him.

The question of prejudice, or disadvantage, now before this Court for the second time, resolves conclusively on three distinct levels, each demonstrating that the judgment below should be reversed.

(1) Absence of counsel at arraignment must have been by any reasonable appraisal of the nature of arraignment, and the issues posed by this case, prejudicial in and of itself. "The entering of a plea is one of the most critical stages in the proceedings." Orefield, Criminal Procedure From Arrest to Appeal 425. Indeed, arraignment is so crucial a stage of criminal litigation that state law concerning appointment of counsel generally provides that the right attaches at or before arraignment. See Appendix B. As stated in *Von Moltke* v. *Gillies*, 332 U. S. 708, 723, "arraignment is too important a step in a criminal proceeding

to give such wholly inadequate representation to one charged with crime." See also, *House* v. *Mayo*, 324 U. S. 42, 45-46. Petitioner alone could hardly have been expected to know that he might have, for example, negotiated, in exchange for a plea of guilty to a lesser offense, a lighter sentence. See *Williams* v. *Kaiser*, 323 U. S. 471, 475-476.

The nature of the charge emphasized petitioner's inability to cope with the situation he faced. The crucial issue to be tried was the nature of petitioner's intent, for intent was the gravamen of the offense, cf. *Wicks* v. *State*, 44 Ala. 398, 400 (1870), and a serious issue of fact in this case. Faced with an indictment charging burglary with intent to "ravish", petitioner could not assess the nature and weight of the proof relevant to prove or rebut the alleged intent. Indeed petitioner could hardly be expected to understand even what was meant by "intent to ravish" or the elements of the offense.[13] Petitioner could not be presumed to know

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[13] The court's charge, astoundingly, did not at all define ravish. Any uncertainty is not merely a matter of speculation about petitioner's vocabulary. Considering the following, what does "to ravish" mean even to a lawyer who examines the Alabama criminal code?

(1) The burglary statute prohibits burglary "with intent to steal: or "with intent to commit a felony" (Ala. Code Tit. 14, §85).

(2) The Code lists no felony called "to ravish" (Tit. 14, passim); though it does forbid "rape" (Tit. 14, §395).

(3) Only in another Title of the Code does any verbal connection between "rape" and "ravish" appear in the Form of Indictment for Rape—Tit. 15, §259, form 89, which provides: "A.B. forcibly ravished C.D., a woman, etc." The rape statute does not use the word "ravish".

Query: (1) Does the indictment even charge an offense when it charges intent "to ravish", while the burglary statute (and also the form for burglary indictments, Tit. 15, §259, form 29) calls for intent to commit a "felony?"

(2) If the indictment really charges intent to commit the felony of rape, is it sufficient, failing to mention the elements of force, or even the name of the intended victim of rape (par-

that he had any alternative to pleading "guilty" or "not guilty." He could not know that his absolute right to plead "not guilty by reason of insanity" under Ala. Code Tit. 15, §423, is lost if not entered at the time of arraignment. *Morrell* v. *State*, 136 Ala. 44, 34 So. 208 (1903). While there is a discretionary power to allow later entry of the plea this discretion is "not revisable" on appeal and may be reversed only for abuse of discretion. *Rohn* v. *State*, 186 Ala. 5, 65 So. 42 (1914); *Garett* v. *State*, 248 Ala. 612, 29 So. 2d 8 (1947). When petitioner's lawyer was appointed after arraignment, petitioner had already lost an absolute right under Alabama law and he retained merely a right to appeal to the discretion of the Court. Moreover, arraignment is the time to present various defenses under Alabama law. Code of Ala. 1940, Tit. 15, §279.

(2) But beyond this, the trial itself was riddled with explosions caused by petitioner's conflict with the court, his awkward efforts to conduct his defense, petitioner's clashes with his counsel, counsel's efforts to withdraw, the court's censure of petitioner. The conflict between defendant and defense counsel was openly displayed to the venire of prospective jurymen before the trial commenced (R.* 15-16), accompanied by the Court's expression of regret (R.* 17) in holding appointed counsel to his assigned task. This con-

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ticularly when the only aggrieved person named in the indictment is a man)?

Moreover, the dictionary definition of "ravish" gives primacy to the sense of abduction; rape is but a subsidiary meaning, among several. Webster's New International Dictionary (2d ed. unabridged, 1953).

These queries are all obviously questions of state law never raised in the trial court and not directly before this Court; but this is not the point. The point is that, unaided, petitioner could not even be presumed to know that indictments don't always properly state an offense. A lawyer would know to read an indictment with this in mind prior to entry of a plea on the merits.

flict was re-emphasized as the trial progressed, by the court's repeated restatement of its reason for allowing defendant to cross-examine witnesses (R.* 31, 37).

Defendant's inept attempts to represent himself led the trial into chaos and confusion from which defendant emerged the loser, a victim of his own ignorance and bewilderment. The perception and insight of the Court at the outset (R.* 19) in warning defendant about his conduct should have served as sufficient notice that defendant was unlikely to be able to conduct a cross-examination, present evidence, or argue the law according to the usages of the law.

The Court never inquired as to the basis for, or nature of, the dissension between defendant and appointed counsel—although from the start it must have been plain that something was amiss. Defendant's ambiguous statement—"This lawyer is not my lawyer." (R.* 116)—might have concealed beneath it either a real impediment and conflict or merely a confused mind. A few questions might have cleared the air. The defense attorney's motion to withdraw from the case was left similarly unexplained. It is reasonable to assume that Court appointed counsel knew the rule, enunciated by the court below, and familiar to the point of being a cliché, that:

> "In the first place, attorneys at law are officers of the Court. An attorney assigned as counsel ought not to ask to be excused for any light cause" (R.* 111).

He may have fully believed that he had more than a "light cause" for seeking to withdraw in this capital case. But the Court denied the motion summarily without discussion or inquiry.

The request to withdraw comprised the first words uttered by Mr. Mayfield in the record. Was this motion a

spur of the moment reaction to petitioner's statement that Mr. Mayfield was not his lawyer, or counsel's planned first move at the beginning of the case, the product of reflection and lingering doubts? How long in advance of trial did counsel decide that he would prefer not to try the case? How did it affect his preparation? Was the reluctance the product of an inhibiting conscientious belief in his client's guilt, cf. *Johns* v. *Smyth*, 176 F. Supp. 949 (E. D. Va. 1959), a conflict of interest, or other serious impediment? We can only speculate futilely. The jury, too, was left to speculate.

Such an arrangement inevitably resulted in a *pro forma* representation of a kind condemned by the Fourteenth Amendment. *Powell* v. *Alabama, supra,* and *Von Moltke* v. *Gillies, supra,* emphasize respectively denial of real representation, where responsibility is divided and where counsel is reluctant.

The fact that the Court may have hoped to grant petitioner greater protection by permitting him to examine witnesses and act as his own co-counsel, pales in the light of the actuality that petitioner was given merely an implement of further self-destruction. At the end of the trial the Court asked if defendant had any objection to the charge, and the answer (defendant's last words, save two, before the jury retired) obviously applies beyond the specific question, to the entire proceeding:

"I didn't understand it, sir" (R.* 92).

A reading of the trial record will confirm that the evidence contains more than a few mysteries as to what actually transpired, and what petitioner actually intended on October 13, 1957. One thing is apparent: this is no stark record of a ghastly crime; this is not the case of a "notorious criminal" where "guilt permeates a record."[14] This is a

[14] *Abel* v. *United States*, 362 U. S. 217, 241 (dissenting opinion).

case where guilt depended upon a determination of what was in the defendant's mind, upon whether or not he had the intent to commit all the elements of a substantive felony, i.e., rape; and where decision must have been made not on the basis of an inference from a finding of breaking and entering (for this would not support a logical conclusion that defendant had any *particular* felony in mind) but rather from bits of facts, circumstances and inferences. This Court does not sit to review the sufficiency of the evidence, or the adequacy of the court's charge to the jury,[15] but it must necessarily observe the overall record in assessing the prejudice to the petitioner which flowed from the series of events claimed to have resulted in a denial of effective assistance of counsel.[16]

The complex issues in the case called for the utmost diligence on the part of counsel. In this respect the case resembles *Reynolds* v. *Cochran*, 365 U. S. 525, 532-533, where it also was argued that absence of counsel was "harmless." To this the Court replied:

> We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere exist-

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[15] The court's charge on "intent to ravish" is certainly uninformative. For example what does "ravish" mean? Is it not necessary to know the elements of the crime of rape to be able to discover an intent to rape? Is not the intention to employ force or coercion an essential element of the proof? These questions should probably all be answered in the affirmative. See: *Aiola* v. *State*, 39 Ala. App. 215, 96 So. 2d 816 (1957); *Hawkins* v. *State*, 25 So. 2d 441 (1946); *Jackson* v. *State*, 102 Ala. 167, 15 So. 344 (1893); Compare: *Simpson* v. *State*, 81 Fla. 292, 87 So. 920 (1921) and note, Ann. Cases 1913C, p. 517. But could the jury be presumed to know these answers, or the petitioner be presumed capable of raising them in his capacity as "co-counsel" for the defense.

[16] Cf. *Parker* v. *Ellis*, 362 U. S. 574, 577, note 3 (dissenting opinion) (May 16, 1960).

ence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value. Plainly, such assistance might have been of great value to petitioner here.

And, in view of the record and issues which counsel might have raised, much of what was said on the counsel issue in *McNeal* v. *Culver*, 365 U. S. 109, 116, might be said of the same question here:

> These complex and intricate legal questions were obviously "beyond the ken of a layman." Cash v. Culver, supra, at 638.
>
> Indeed, it is questionable whether such a crime as the one upon which petitioner was charged, tried and convicted—"Assault to Murder," not "Assault with Intent to Commit Felony"—actually exists under the Florida law, Williams v. State, supra, and it is equally uncertain whether the verdict, convicting petitioner of "Assault to Murder in the Second Degree," is sufficient to support the judgment in the light of 2 Fla. Stat. 1957, p. 2957, §921.03, which contains the provision that "no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue." See also French v. State, 96 Fla. [illegible] 678 So. 815.
>
> Moreover, the record contains facts which would have instantly suggested to counsel that petitioner might have a good insanity defense. "[W]hen there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." Farrell v. State (Fla. 1958), 101 So. 2d 130, 133. It is too

much to expect this mentally ill petitioner effectively to raise and establish the defense of his own insanity, and, so far as this record shows, neither the prosecutor nor the trial court took any notice of the matter.

Moreover, as a practical matter, the problem of incompatability between counsel and client very well could have been resolved earlier if counsel had been at arraignment. Obviously the matter of representation was one on which the petitioner had brooded long. His first words to the Court were: "This lawyer is not my lawyer." R.* 16. While it is perhaps futile to speculate on what might have been, as court appointed counsel's affidavit has (he "would not have entered any different plea . . ." R. 13 if he had been present), we reasonably may assume that the incompatibility which caused the eruption marking the outset of the trial might have been discovered by the Court if counsel and client had been brought together earlier at arraignment. At such time the Court well could have identified the difficulties and either resolved them or secured new counsel. If this be mere speculation, it further demonstrates the problems of applying a rule of "prejudice" to capital proceedings.

(3) In any event, looking at the cause solely from the vantage of arraignment and in the light of subsequent occurences at the trial, even under the rule proposed by the Court below the judgment below should fall.

Without denying the importance of arraignment or the value of counsel at this initial stage of the case, the Court below relies on a number of cases, including *Counsel* v. *Cremmer*, 177 F. 2d 22 (D. C. Cir. 1949); *Canizio* v. *New York*, 327 U. S. 82; and *In the Matter of the Application of Sullivan and Braasch*, 126 F. Supp. 564 (D. Utah 1954), R. 30-34, for the proposition that representation afforded sub-

sequent to arraignment demonstrates that had opportunities for defense at arraignment been overlooked, counsel might have asserted them at later stages. While this overlooks the fact that, as indicated above, the opportunity to assert such defenses as jury discrimination and insanity became discretionary rather than absolute after arraignment, the record here demonstrates a defect in the reasoning even more fatal.

The shambles into which the trial collapsed, the prejudicial conflict between petitioner and his counsel and the court, petitioner's inept efforts to defend himself, spurred on by the Court, the failure of counsel to explore crucial legal issues, and even to subpoena Mrs. Giangrosso whose testimony he clearly desired, compel the conclusion that here was a situation from which no cure could emerge for earlier failure.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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APPENDIX A

Sep 17 1959

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

SPECIAL TERM 1959

6 Div. 164

CHARLES CLARENCE HAMILTON

—v.—

THE STATE OF ALABAMA

APPEAL FROM JEFFERSON CIRCUIT COURT

LIVINGSTON, *Chief Justice*:

The appellant, Charles Clarence Hamilton, was indicted by the Grand Jury of the Tenth Judicial Circuit of Alabama for burglary in the first degree under the provisions of Sec. 85 of Title 14, Code of Alabama 1940, which reads as follows:

> "§85. Burglary in the first degree.—Any person who, in the nighttime, with intent to steal or to commit a felony, breaks into and enters any inhabited dwelling house, or any other house or building, which is occupied by any person lodged therein is guilty of burglary in the first degree, and shall on conviction be punished at the discretion of the jury, by death or by imprisonment in the penitentiary for not less than ten years."

The indictment contained two counts. Count 1 charged the defendant with breaking and entering into the inhabited dwelling house of Jacob C. Milko in the nighttime with intent to steal, etc. Count 2 of the indictment charged the defendant with breaking and entering into the inhabited dwelling house of Jacob C. Milko in the nighttime with intent to ravish, etc.

The jury returned a verdict of guilty as charged in Count 2 of the indictment and fixed the punishment at death. Judgment was rendered accordingly. Appellant's motion for a new trial was overruled. This appeal comes to this court under the Automatic Appeal Statute, Title 15, Sec. 382, Code of Alabama 1940, Cumulative Pocket Part. The Honorable Clell L. Mayfield was appointed by the trial court to, and did, defend the appellant on his trial in the court below. On appeal, it appears that the appellant is represented by four other and different attorneys at law.

The evidence for the state tended to prove the following:

On the night of October 13, 1956, Mr. and Mrs. Jacob C. Milko were occupying a dwelling house designated at 1501 Avenue G. Ensley, Jefferson County, Alabama. Living with Mr. and Mrs. Milko were the grandparents of Mrs. Milko. The grandparents were Jake Giangrosso and Mary Giangrosso, each of whom occupied separate rooms. The grandmother, Mrs. Mary Giangrosso, occupied a room adjoining that of Mr. and Mrs. Milko, connected by a door between the two rooms. Mr. Giangrosso's room also had a door leading out to the front porch of the dwelling house. Jake Giangrosso occupied a room in another part of the dwelling.

During the early morning hours, sometime between 2:00 and 3:00 o'clock of October 13, 1956, Mr. and Mrs. Milko heard the grandmother in the adjoining room making a loud noise or groaning. Mr. Milko got out of bed and opened the door leading into Mrs. Giangrosso's room,

where he found the defendant, Charles Clarence Hamilton, standing near the door between the two rooms. His shoes were off, one being under the bed of Mrs. Giangrosso, and the other near the front door. His pants were off and were on the bed of Mrs. Giangrosso, and he was in his undrewear, and as expressed by Mr. Milko, "His downstairs was hanging out, and he didn't have no shoes on and he had an old corduroy shirt on, and he was staring me straight in the face. That was all he had on." The front door of Mrs. Giangrosso's bedroom leading to the porch was open. Mr. Milko went back in his bedroom and procured a revolver, returned to Mrs. Giangrosso's bedroom where the appellant was still standing, turned on the light, held his gun on appellant, and told his wife, Mrs. Milko, to call the law. Mrs. Giangrosso was standing between the bed and the door leading into Mr. Milko's room. Upon turning the lights on, the front door was seen to be wide open. Mr. Milko held the appellant until two police officers arrived, which was only a few minutes. Mr. Milko further testified that he was employed by the Tennessee Coal, Iron and Land Company in the Transportation Division, and that on the day in question, his working hours were from 3:00 P.M. until 11:00 o'clock; that when he got home his wife had retired and his wife's grandmother and grandfather had also retired; that he unlocked the front door leading into Mrs. Giangrosso's beroom and went through her bedroom into his own bedroom, and Mrs. Giangrosso was in bed at that time, as was also his wife.

Testimony further shows that Mrs. Giangrosso is of Italian birth, speaks English with difficulty, is partially blind, more or less feeble, and suffers with a heart condition. Testimony further shows that the front door leading from Mrs. Giangrosso's bedroom to the outside was locked prior to the defendant's entry, and after apprehension of the defendant marks of a forcible entry were found on the

door leading from the porch into Mrs. Giangrosso's bedroom.

Mrs. Milko testified that she had seen the defendant at previous times walking in front of the Milko dwelling and at those times he made certain obscene motions with his hands.

The appellant testified, in substance, that Mrs. Giangrosso came out of her house on the night in question and began to yell at him, and grabbed him by the arm and forced him to accompany her into her room; that she made him sit down by her bed for about an hour and take off his shoes; that her son-in-law came in and pulled his pistol on him and held him for the police. The appellant further testified that he was indicted November 9, 1956, by the Grand Jury for nighttime "burglary with intent to steal." (This testimony will be referred to later.) Appellant further testified that there was no telephone in the (Milko) house, and that Milko went outside the house to get the police.

In rebuttal, both Mr. and Mrs. Milko reiterated their testimony to the effect that there was a telephone in the Milko home and that Mrs. Milko called the officers while Mr. Milko held the appellant. The evidence further tends to show that the Milko home is located within two or three blocks of the police station.

Appellant insists that in capital cases where defendant is unable to employ counsel the court must appoint effective counsel for him, and failure to do so denied defendant a fair trial and violates the equal protection and due process clause of the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the State of Alabama; and that right of accused to assistance of counsel includes the right to assistance from time of arraignment until beginning and end of the trial.

We have no quarrel with the above insistence of counsel for appellant, but the principle is without application to the

record before us. The record discloses that Hon. Clell I. Mayfield was appointed by the court to defend, and did defend, the appellant on his trial in the court below. But counsel who now represent appellant on this appeal insist that Mr. Mayfield was not appointed until after appellant was arraigned and had entered a plea of not guilty. Present counsel attached to their brief a certified copy of the bench notes of the trial judge in this case. The argument is that the bench notes show that appellant was arraigned on March 1, 1957, and also show that Mr. Mayfield was appointed counsel for appellant on March 4, 1957. The record contains the following minute entry:

"ARRAIGNMENT

"THE STATE

vs.

CHARLES CLARENCE HAMILTON

Indictment for Burglary with intent to Steal, Burglary with Intent to Ravish

Honorable Wallace Gibson, Judge Presiding

"This the 1st day of March, 1957, came Emmett Perry, Solicitor, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by attorney, and the said defendant being now in open Court, and being duly arraigned upon the indictment in this cause, for his plea thereto says that he is not guilty."

Also, the judgment entry of the 23rd day of April, 1957, the date on which appellant was tried, is to the same effect as the minute entry upon arraignment.

A minute entry constitutes the final record of a judgment. It cannot, in a court of record, be impeached by the judge's bench notes or memoranda, which operate only as a direction to the clerk as to what judgment and orders shall be entered on the court's records. *Ex parte Haynes* v. *State*

of Alabama, 39 Ala. App. 349, 98 So. 2d 670; *Lockhart* v. *State*, 30 Ala. App. 297, 39 So. 2d 40.

In *Du Pree* v. *Hart*, 242 Ala. 690, 8 So. 2d 183, 186, it is stated:

> "It is said in Briggs v. Tennessee C., I. & Ry. Co., 175 Ala. 130, at page 142, 57 So. 882, that there is no law requiring a judge to make bench notes, and because such notes do not include rulings which appear in the judgment entry is not good ground to hold that such rulings were not made. Bench notes were not necessary to sustain a judgment entered on the minutes during the term of court, against attack made on the judgment; and the judgment entry prevails over the bench notes when they conflict. Lockwood v. Thompson & Buchmann, 198 Ala. 295(3), 301, 73 So. 504. But they were always necessary to justify an order nunc pro tunc. During the term prior to the Code of 1923 the judge had control of the entry and could add to, strike out or alter its records. Wilder v. Bush, 201 Ala. 21, 75 So. 143. Under section 6670, Code of 1923, the judge had such power for thirty days after the judgment was rendered. Code of 1940, Title 13, section 119."

Counsel for appellant next insist that to constitute burglary in the first degree "there must be a breaking and entertering of the dwelling house of another with an intent to commit a felony therein." This argument presents purely a question of fact in that the evidence was amply sufficient to prove a breaking and entering of the dwelling of another in the nighttime with the intent to commit a felony therein, and is without merit.

The appellant testified in his own behalf. After appellant had been cross-examined by the solicitor for the state, he, as distinguished from re-direct examination by his attorney, requested the court to allow him to testify further.

The trial court granted the request. The appellant then proceeded to testify to the effect that he had been indicted twice for the same offense, and made certain other irrelevant and immaterial statements. The trial court interrupted the appellant and explained to him that he was entitled to testify only to matters that were relevant and material to the matters involved in the indictment upon which he was then on trial. We have carefully examined the proffered testimony, which is our duty under the Automatic Appeal Statute, and are clear to the conclusion that no error intervened in reference to the proffered testimony, nor did error intervene as to the manner or method in which the trial court conducted this part of the trial, nor as to the colloquies which ensued between the trial court and appellant with reference thereto.

Mention is made in brief of other colloquies between the court and the defendant during the trial in the court below. Suffice it to say, that no objections were made nor exceptions reserved to any remarks made by the court.

It was stated in *Washington* v. *State*, 259 Ala. 104, 65 So. 2d 704:

> "• • • Only review of rulings on trial with respect to matters of evidence are within the scope of the statute obviating the necessity of interposing seasonable objection and exception. Code 1940, Title 15, § 382(10), 1951 Cum. Pocket Part, Vol. 4, p. 103; Broadway v. State, 257 Ala. 414, 60 So. 2d 701(4); Townsell v. State, 255 Ala. 495(4), 52 So. 2d 186; James v. State, 246 Ala. 617, 21 So. 2d 847."

See, also, *Jackson* v. *State*, 260 Ala. 641, 71 So. 2d 825.

At the beginning of the trial of appellant on April 23, 1957, defendant stated to the court that the lawyer appointed to defend him by the court was not his lawyer, and the court-appointed attorney asked permission to withdraw

from the case. On this occasion, the court asked the appellant if he had other counsel, and he replied that he did not. Thereupon, the court explained the purposes and duty of the court to appoint capable counsel to represent those defendants charged with capital offenses who were unable to employ counsel, and declined to allow the court-appointed counsel to withdraw.

Sec. 318, Title 15, Code of 1940, as amended by Act No. 176, Acts of Alabama 1947, p. 61, provides that:

> "When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, • • • "

In the first place, attorneys at law are officers of the court. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause. Code of Ethics of Alabama State Bar Association. In the second place, the appellant did not indicate to the court that he wished the court-appointed attorney to withdraw from his defense, nor that he was unfaithful or incompetent. He merely stated, without more, that the court-appointed attorney was not his lawyer. The record before us does not indicate to the slightest degree that the appellant was seeking to discharge his attorney in order to exercise his right to conduct his own defense. At most, the statement made by the appellant indicated only that he did not approve of the court-appointed attorney. But present counsel insist that under these circumstances representation could be nothing more than pro forma. But in their brief, with commendable candor, they stated: "We do not mean to reflect upon the capabilities of counsel representing defendant."

Even conceding that appellant requested the dismissal of his court-appointed attorney, to yield to such a request, where the defendant has not made it clear that he really wishes to conduct the defense in propria persona gives far too great a chance to delay trials and otherwise embarrass effective prosecution of crime. *United States* v. *Gutterman*, 147 F. 2d 540, 157 A. L. R. 1221; *United States* v. *Mitchell* (2d Cir.), 137 F. 2d 1006, Id. (2d Cir.), 138 F. 2d 831.

We have carefully examined the record with reference to the conduct of the trial by the court-appointed attorney, and are of the opinion that he did his full duty under the circumstances. And as was stated in *Arrington* v. *State*, 253 Ala. 178, 43 So. 2d 644:

> "While an attorney must see that the rights of his client are protected, he cannot be subjected to censure because he does not manufacture evidence."

There is no merit in this contention of the appellant.

The trial court refused six written charges duly requested by the appellant. Charge 1 relates only to Count 1 of the indictment. The defendant was convicted under Count 2 of the indictment, therefore, reversible error could not intervene because the verdict of the jury was, in effect, and acquittal under Count 1 of the indictment. Charge 2 is in the following language:

> "2. The court further charges that intent to ravish must be accompanied by violence or force towards the person before it can be distinguished as such, and if the jury does not find from the evidence such dements (sic) of force or violence, they must acquit the defendant under the 2nd Count in the indictment."

Charge No. 2 is an incorrect statement of the law. The breaking and entering the house with intent to ravish is the gravamen of the offense charged in Count 2 of the in-

dictment, and it is not required that the intended act be consummated. L. Whart., Crim. Law, 8th Ed., Sec. 818; *Wicks* v. *State*, 44 Ala. 398; *Wolf* v. *State*, 49 Ala. 359; *Barber* v. *State*, 78 Ala. 19; *Holland* v. *State*, 247 Ala. 53, 22 So. 2d 519. The charge is also inaptly drawn and is confusing in its tendencies. For like reasons, Charges 5 and 6 were properly refused.

Charge No. 3 was substantially covered in the oral charge and its refusal was without error.

Refused Charge 4 is misleading and incorrect under the evidence presented in this case. There is no evidence that the dwelling house entered and occupied by Jacob C. Milko and family was effectively divided into portions, rather, the evidence is uncontroverted that the house was occupied by Mr. Milko and his family as a unit.

We have examined the record with care and find no error to reverse.

Affirmed.

Lawson, Simpson, Stakely, Goodwyn and Merrill, *JJ.*, concur.

APPENDIX B

A large number of states have concluded that arraignment is so essential a stage of criminal proceedings that the right to counsel attaches at that point. The Supreme Court of Alabama has, in the present case, recognized that the right to counsel in capital cases attaches at the arraignment stage. See R. 29; Code of Ala., Tit. 15, §318 (appointment of counsel for indigents in capital cases). The legislatures of nineteen states have implemented this policy in statutes which require courts to appoint counsel for indigents in virtually all felony prosecutions: Alaska Code (1948) §66-10-3 (no specific mention of duty to appoint); see Const. Art. XV, §1 (continuance of laws after statehood). Ark. Stat. Ann. §43-1203 (See *Swagger* v. *State*, 227 Ark. 45, 296 S. W. 2d 204 (1956)). Calif. Penal Code §987 (See *People* v. *Harel*, 134 Cal. App. 2d 213, 285 P. 2d 317 (1955)). Idaho Code Ann. §19-1512 (See *State* v. *Poglianich*, 43 Idaho 409, 252 Pac. 177, 181 (1927)—right-to-counsel provisions); (See also §19-1513). Ill. Supreme Court Rules, Rule 26(2). Ill. Rev. Stat. §101.26(a); (See also Ill. Criminal Code §730). Iowa Code Ann. §775.4. Gen. Stat. of Kansas (1959 Supp.) §62-1304 (See *Brandt* v. *Hudspeth*, 162 Kan. 601, 178 P. 2d 224, 227 (1947)—provision mandatory). Mo. Rev. Stat. (1949), §545.820 (See *State* v. *Allen*, 174 Mo. 689, 74 S. W. 839 (1903) and *Edwards* v. *Nash*, 303 S. W. 2d 211, 215 (Kan. City C. A. (1957)—capital case). Rev. Code of Montana, §94-6512. Nev. Rev. Stat. §174.120. N. Y. Code of Criminal Procedure §308. North Dakota Century Code, §29-13-03. See N. D. Century Code, §29-01-27 (assignment of counsel). 22 Okla. Stat. §464 (Cf. *Johnson* v. *State*, 79 Okla. Crim. 363, 155 P. 2d 259, 260 (1945) (Syllabus by the court—capital cases); Ore. Rev. Stat. §135.320. South Dakota

Code §34.3506 (1960) (See *State* v. *Jameson*, 77 S. D. 340, 91 N. W. 2d 743, 745 (1958)) (See also 34.1901). Utah Code Anno. §77-22-12. Code of Va. §19.1-241 (appointment of counsel before accepting plea). Rev. Code of Wash. §10.40.030 (See *State* v. *Dechman*, 51 Wash. 2d 256, 317 P. 2d 527 (1957), *Friedbauer* v. *State*, 51 Wash. 2d 92, 316 P. 2d 117 (1957)) (See also §10.01.110); Wis. Stat. Ann. §957.26(2).

The judicial rules of two states require that counsel be appointed for indigents at the arraignment stage: Arizona Rules of Criminal Procedure, Rule 39(b); cf. New Jersey Rev. Rules, §1:12-9, with Author's Comment (at arraignment whenever practicable).

Texas requires that indigents charged with capital offenses have counsel appointed at arraignment. See Vernon's Texas Code of Criminal Procedure §494, as amended by Acts 1959, 56th Leg., p. 1061, c. 484, §1, with §491 and *Hill* v. *State*, 310 S. W. 2d 588 (Tex. Cr. 1958).

Courts of two states have interpreted their state constitutions to require that one charged with crime is entitled to representation of counsel at every stage of litigation. If the accused is indigent the courts are required to appoint effective counsel. Ind. Const. Art. I, §13. See *State ex rel. Grecco* v. *Allen Circuit Court*, 238 Ind. 571, 574, 153 N. E. 2d 914, 916 (1958) (at every stage); *Batchelor* v. *State*, 189 Ind. 69, 125 N. E. 773 (1920) (Ind. Const. Art. I, §13 applies to early stages of litigation); Ky. Const. Art. I, §11, See *Calhoun* v. *Commonwealth*, 301 Ky. 789, 193 S. W. 2d 420 (1946) (counsel must be appointed for indigents); *Wilcher* v. *Commonwealth*, 297 Ky. 36, 178 S. W. 2d 949 (1944) (right to counsel at each stage of the trial).

Statutes or court rules of four states provide for the appointment of counsel to represent indigents after indictment, the implication being that appointment is to be

before arraignment: Minn. Stat. (1957), §611.07, as amended by Minn. Laws 1959, c. 383 (See the unamended statute which speaks specifically of the right to counsel at arraignment, and see *State ex rel. Welper* v. *Rigg*: 254 Minn. 10, 14, 93 N. W. 2d 198 (1958)); Ohio Rev. Code §2941.50 (see *State* v. *Cartwright*, 81 Ohio L. Abs. 226, 161 N. E. 2d 456, 457 (1957)—"both before arraignment and at all subsequent stages of the case."); W. Va. Rules of Practice for Trial Courts Rule IV(a); Wyo. Stat. §7-7.

Three other states, which have provided for the appointment of counsel to represent indigents, appear to have endorsed the practice of appointing counsel at very early stages of litigation: Ga. Const. Art. 1, §5 (Ga. Code Anno. §2-105). See *Bibb County* v. *Hancock*, 211 Ga. 429, 436, 86 S. E. 2d 511, 517 (1955) (the constitutional provision requires appointment of counsel to represent all indigents accused of an offense), and Ga. Code Ann. §27-3001 (A) (capital cases—"[w]hen ever it shall appear," that indigent accused is without counsel). Mich. Stats. Ann. §28.1253 as amended by Public Acts 1957, No. 256 ("Whenever any person charged . . . shall be unable to procure counsel.") See Op. Mich. Att. Gen., Oct. 7, 1957 (provision interpreted to mean that counsel should be appointed for indigents after they are bound over for trial). But see, *People* v. *Williams*, 225 Mich. 133, 195 N. W. 818 (1923) (no general right to counsel at public expense). See Tenn. Code §40-2002 ["counsel in all matters necessary for his defense"] with §40-2003 [appointed counsel for indigents]. See also: *Poindexter* v. *State*, 183 Tenn. 193, 191 S. W. 2d 445 (1946) [murder charge—counsel appointed after arraignment and given little opportunity to confer—violation of United States Constitution, Amend. VI and Tenn. Const. Art. I, §9].

Two states provide that in capital (and other serious) cases if an indigent defendant appears in court without

counsel, counsel shall be appointed apparently at early stages. See Del. Code Ann. §5103 with Superior Court Rules, Rule 44 ("to represent him at every stage"). Purdon's Pa. Stat. Tit. 19, §§783, 784. See *Commonwealth ex rel. Sheller* v. *Burke*, 367 Pa. 152, 79 A. 2d 654 (1951) (the extent of the right at arraignment).

Maryland provides that an accused must at least be informed of his right to counsel at arraignment. See Md. Rules of Procedure, Criminal Causes, Rule 723(b); *Roberts* v. *State*, 219 Md. 485, 150 A. 2d 448 (1959), and *Bryant* v. *State*, 218 Md. 151, 145 A. 2d 777 (1958).

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FILED
OCT 7 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1961

No. 32

CHARLES CLARENCE HAMILTON,

Petitioner,

versus

STATE OF ALABAMA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT

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In the

Supreme Court of the United States

October Term, 1961

No. 32

CHARLES CLARENCE HAMILTON,

Petitioner,

versus

STATE OF ALABAMA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT

I
OPINIONS BELOW

The opinion of the Supreme Court of Alabama denying petitioner's petition for leave to file an application for writ of error coram nobis in the trial court is reported at 271 Ala. 88, 122 So. 2d 602, and is printed in R. pp. 27-35. An earlier opinion of the same court affirming petitioner's judgment of conviction is reported at 270 Ala. 184, 116 So. 2d 906 (See also Appendix A of petitioner's brief, pp. 1a - 10a), and this Court's denial of certiorari is reported at 363 U. S. 852.

II
JURISDICTION

Pursuant to Title 28, United States Code, Section 1257, petitioner was granted a writ of certiorari by this Court on

January 9, 1961 to review the judgment of the Supreme Court of Alabama, rendered on August 15, 1960, denying his petition for leave to file an application for writ of error coram nobis in the Circuit Court of Jefferson County, Alabama (See "Opinions Below," supra). *Hamilton v. Alabama*, ...U. S. ....., 81 S. Ct. 388.

III
QUESTIONS PRESENTED

1. Whether there is a violation of due process of law or an impingement of fundamental rights by the Alabama Supreme Court's denial of a petition for leave to file an application for writ of error coram nobis in the trial court when the petition alleges that the petitioner pleaded not guilty to a capital crime while not represented by counsel at his arraignment on March 1, 1957, but it makes no showing or effort to show that petitioner was prejudiced or disadvantaged in any way by such absence of counsel at arraignment, when the record shows that competent counsel, who was appointed to represent petitioner on March 4, 1957, stated that he would not have entered any different plea than the one of not guilty which had been entered by petitioner on March 1, 1957, and when the record shows that said counsel actively represented petitioner at his trial on April 23, 1957.

2. Whether, under the total facts of the case and the allegations and evidence presented by him to the Supreme Court of Alabama in his petition for leave to file an application for writ of error coram nobis, this petitioner has established the existence of such prejudice or disadvantage by reason of his having been unassisted by counsel at arraignment when he interposed a plea of not guilty to an indictment charging him with a capital crime as to warrant this Court's finding that an ingredient of fundamental unfairness actively

operated in the process that resulted in his conviction and death sentence and that, as a consequence, he was denied due process of law.

IV

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Code of Alabama 1940: Title 14, Section 85

Title 15, Section 318

Title 15, Section 423

Constitution of the United States: Fourteenth Amendment

United States Code: Title 28, Section 1257

V

STATEMENT

The pertinent facts of this case are set out in detail in the opinions of the Supreme Court of Alabama cited in "Opinions Below," supra, but, briefly, they are as follows:

The offense of which petitioner stands convicted occurred on October 12 or 13, 1956 (R. p. 1; Appendix A, petitioner's brief, p. 2a); on November 9, 1956 the grand jury of Jefferson County, Alabama, returned a one-count indictment charging petitioner with the offense of burglary of an inhabited dwelling in the nighttime with intent to steal (R. pp. 1, 28); on January 4, 1957, while represented by competent (R. p. 35) court-appointed counsel, Honorable Clell I. Mayfield, petitioner was arraigned on that indictment and pleaded not guilty (R. pp. 1, 4, 13); on February 12, 1957, a second indictment, consisting of two counts, was returned against petitioner, the first count charging burglary of an inhabited

dwelling in the nighttime with intent to steal, and the second count charging burglary of an inhabited dwelling in the nighttime with intent to ravish. (R. pp. 2,28).

Both the first and second indictments arose out of the same transaction (R. p. 28), and Mr. Mayfield, who considered himself as representing petitioner for the second case and was aware of the fact that a second arraignment would be had on a day certain (R. pp. 13, 14, 28), did not attend the second arraignment because he was of the opinion that it was a mere formality and that his presence would not be necessary since a plea of not guilty would again be entered (R. p. 13); on March 1, 1957, while unattended by any counsel, petitioner was arraigned upon the second indictment and pleaded not guilty (R. pp. 2, 4, 28); on March 4, 1957, in order that he might receive his fee for the second case, Mr. Mayfield was again appointed to represent petitioner (R. pp. 4, 15); on April 23, 1957, while actively represented by Mr. Mayfield (See record filed with the petition for writ of certiorari, No. 1026 Misc., October Term, 1959), petitioner was tried by a jury, was found guilty of the second count of the second indictment, and was sentenced to suffer death (See record filed with the petition for writ of certiorari, No. 1026 Misc., October Term, 1959); on April 24, 1957 the first indictment was nolle prossed (R. pp. 1, 4); under the automatic appeal statute the judgment was reviewed and affirmed by the Supreme Court of Alabama, and certiorari was denied by this Court (See "Opinions Below," supra).

Subsequently, petitioner filed in the Supreme Court of Alabama a petition for leave to file an application for writ of error coram nobis in the Circuit Court of Jefferson County, Alabama, alleging, *inter alia*, that he was without counsel on March 1, 1957 when he was arraigned and pleaded not guilty, but said petition contained no showing or effort to show that he was prejudiced or disadvantaged in any way by the absence of counsel when he was arrainged and entered his plea

of not guilty (R. pp. 13, 35); the petition for writ of error coram nobis was denied by the Supreme Court of Alabama and, upon timely petition therefor, this Court granted a writ of certiorari to review the state court's judgment (See "Opinions Below," supra).

VI
SUMMARY OF ARGUMENT

To warrant a state court's issuance of the extraordinary writ of error coram nobis, based on an indigent accused's allegation that he pleaded not guilty to a capital charge while not represented by counsel at his arraignment, the petition must make a showing of or, at least, proffer evidence that petitioner, who shortly after arraignment and during his subsequent trial was assisted by competent counsel, suffered substantial prejudice or disadvantage as a result of the absence of counsel when he entered his plea.

The total record in this case clearly demonstrates that petitioner was not so "taken advantage of" as to violate due process of law.

VII
ARGUMENT

1.

The Supreme Court of Alabama has stated, in effect, that in petitioner's case there was a violation of Code of Alabama 1940, Title 15, Section 318 (R. p. 29; petitioner's brief p. 3), providing that the trial court must appoint counsel to represent an indigent person who is charged with a capital crime. Had petitioner, on the appeal from the judgment of his conviction, been able to attack successfully the trial court's judgment entry which, as was subsequently developed by competent evidence, incorrectly stated that he was represented by counsel at the time of his arraignment on March

1, 1957, conceivably his case might have been reversed and remanded; however, by the method employed, he was unable to do this under Alabama law. *Hamilton v. State*, 270 Ala. 184, 116 So. 2d 906, certiorari denied 363 U. S. 852; Appendix A, petitioner's brief, pp. 4a - 6a.

Therefore, said violation of state law should not be considered in this proceeding because the jurisdiction of a federal court is limited to the determination of questions relating to the denial of rights under the federal constitution and does not extend to the adjudication of nonfederal questions of state law. *State v. Sullivan*, 10 Cir. 1955, 227 F. 2d 511, certiorari denied Braasch v. State of Utah, 350 U. S. 973. This Court is not concerned with any contravention of a state's statutes or constitution. *Powell v. Alabama*, 287 U. S. 45; *Williams v. Kaiser*, 323 U. S. 471; *Madden v. Kentucky*, 309 U. S. 83. A decision of a state court resting on grounds of state procedure, which does not offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, does not present a federal question. *Speiser v. Randall*, 357 U. S. 513; *Avery v. Alabama*, 308 U. S. 444; *Brown v. Mississippi*, 297 U. S. 278; *Miller v. Texas*, 153 U. S. 535; *Frank v. Mangum*, 237 U. S. 309; *Crooker v. California*, 357 U. S. 433, 440.

Having been unsuccessful in his appeal, petitioner sought relief by applying for a writ of error coram nobis which, under Alabama law, is available to a person who claims that his conviction and sentence is due to failure to observe that fundamental fairness essential to every concept of justice, even after the judgment has been affirmed by the Supreme Court of Alabama.

However, an application for a writ of error coram nobis should make an adequate showing of the substantiality of the petitioner's claim to the satisfaction of the state appellate court. A mere naked allegation that a constitutional right

has been invaded will not suffice. The application should make a full disclosure of the specific facts relied upon, and not merely conclusions as to the nature and effect of such facts. The proof must enable the court to ascertain whether under settled principles pertaining to such writ the facts alleged would afford at least prima facie just ground for the issuance of the writ. State appellate courts are authorized to exercise their discretion in matters of this character and should look into the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof. *Johnson v. Williams*, 244 Ala. 391, 13 So. 2d 683; *Ex Parte Seals*, 271 Ala. 622, 126 So. 2d 474.

This, then, brings into focus the question of whether the Supreme Court of Alabama erred in denying petitioner's coram nobis petition which, in pertinent part, alleged that counsel was not appointed to represent him until three days after he, without benefit of counsel at his arraignment, had pleaded not guilty to a capital crime, but which contained no allegation and was not supported by any evidence that he was prejudiced or disadvantaged in any way by such absence of counsel at his arraignment (R. pp. 1-7).

The state court grounded its denial of this petition on the fact that there was no fundamental unfairness which would violate due process of law inasmuch as the petition contained no allegation or attempt to show that petitioner was prejudiced or disadvantaged in any way by the absence of counsel when petitioner interposed his plea of not guilty.

Such reasoning by the Supreme Court of Alabama finds support in the decisions of several federal courts dealing with capital as well as non-capital cases. In *Betts v. Brady*, 316 U. S. 455, a non-capital case, this Court indicated that only if the defendant has been disadvantaged under the facts shown to the court, denial of counsel is a denial of due

process. In *Canizio v. New York*, 327 U. S. 82, it was held that the constitutional right of an accused in a state court to the assistance of counsel will not be deemed to have been infringed, so as to require the setting aside of his conviction of robbery in the first degree, unarmed, upon his plea of guilty, where, although he was without counsel when arraigned and when he pleaded guilty, was unfamiliar with his legal rights, and may not have been informed by the court of his right to counsel, it appears that in long hearings during the day of sentence, he was actively represented by counsel, who could have moved to withdraw the plea of guilty, but apparently thought that it would be to his client's best interests not to do so.

Almost invariably it is held that absence of counsel at arraignment does not constitute a violation of due process where the accused enters a plea of not guilty. *Council v. Clemmer*, C.A.D.C. 1949, 177 F. 2d 22; *De Maurez v. Swope*, 9 Cir. 1939, 104 F. 2d 758. This is particularly true where, shortly after the unaided accused enters a plea of not guilty, counsel is furnished for the preparation for his trial and for his trial itself. *United States v. Stevenson*, D.C.D.C. 1959, 170 F. supp. 315; *State v. Sullivan*, 10 Cir. 1955, 227 F. 2d 511, certiorari denied Braasch v. State of Utah, 350 U. S. 973. It is noteworthy that *State v. Sullivan*, supra, involved a capital crime in a state court.

2.

The ultimate test is "fundamental unfairness" (*Crooker v. California*, 357 U. S. 433), and each case must stand on its own particular facts in a determination as to whether or not lack of representation by counsel constitutes a denial of due process. *Uveges v. Pennsylvania*, 335 U. S. 437; *Gibbs v. Burke*, 337 U. S. 773. This court has stated that the test of disadvantage is ignorance, illiteracy, feeble-mindedness, or

other like inadequacy of the defendant which makes him incapable of conducting his own defense in that particular stage of the proceeding. *Powell v. Alabama*, 287 U. S. 45. The defendant's lack of familiarity with his legal rights has been added. *Canizio v. New York*, 327 U. S. 45. Later, the test was expanded to include mental illness and incapability of questioning witnesses where highly complex legal issues are involved. *McNeal v. Culver*, 365 U. S. ____, 81 S. Ct. 413, 5 L.Ed. 2d 445.

In *Jones v. Cochran*, 125 So. 2d 99, the Supreme Court of Florida aptly stated:

> "The necessity for the appointment of counsel in order to meet Fourteenth Amendment requirements is influenced largely by the following factors: (1) the gravity of the offense, (2) the nature and complexity of the issue, (3) the age of the defendant, (4) his mental capacity, (5) background, including education and experience, (6) knowledge of law and procedure and, (7) the degree of protection given during the trial as appears from the conduct of the Court or prosecuting officials. 93 L.Ed. 149. No one of these factors alone is decisive. As pointed out in Betts v. Brady, supra (316 U. S. 455), it is necessary to appraise the totality of the facts and decide whether the need for counsel is so great that the deprivation of such assistance produces a fundamental unfairness."

Applying these tests to the case at bar, it seems clear that the Supreme Court of Alabama correctly denied petitioner's coram nobis petition.

Admittedly, the offense was of the utmost gravity, but the issues involved were not complex. The record does not reflect petitioner's age, but there is no claim made that he

was unusually young. Investigation by the State Board of Pardons and Paroles reveals that he was not ignorant, illiterate, or feeble-minded, having reached the eleventh grade in school, and that two years thereafter he enlisted in the United States Army in which he served from 1950 until January 1956 (See record filed with the petition for writ of certiorari, No. 1026 Misc., October Term, 1959, p. 8). This last mentioned record, pages 9 to 11, coupled with his long military service, dispels petitioner's intimation that he was insane or mentally ill. Pages 55 to 79 of the same record also reflect petitioner's non-professional ability to testify in his own behalf and to question witnesses.

Respondent has no knowledge of petitioner's familiarity with his legal rights, but he was present at his first arraignment on January 4, 1957 when court-appointed counsel pleaded him not guilty to an indictment (R. pp. 1, 4, 13) which, in part, was identical with the second indictment to which petitioner, unaided by counsel, pleaded not guilty when arraigned on March 1, 1957 (R. pp. 2, 4, 28). The second indictment, as well as the first indictment, arose out of the same transaction (R. p. 28). Petitioner received no ill treatment at the hands of the trial judge or the prosecuting attorney. Furthermore, it is reasonable to suppose that prior to receiving his dishonorable discharge from the Army in January, 1956, petitioner was tried by a General Court-Martial at which he was present and where he observed the legal proceedings (See record filed with the petition for writ of certiorari, No. 1026 Misc., October Term, 1959, p. 8).

Counsel was reappointed to represent petitioner on March 4, 1957, three days after the second arraignment (R. pp. 4, 15). Counsel, whose competence is not questioned (R. p. 35), explained why he considered it unnecessary for him to be present at the second arraignment, and stated that had he been present he, too, would have entered a plea of not guilty

(R. p. 13). Counsel actively represented petitioner at the trial on April 23, 1957, which was approximately fifty days after the second arraignment.

It might be argued that had petitioner been represented by counsel at the second arraignment, a motion for a change of venue might have been filed. To this, respondent wishes to point out that there was no claim made that the climate of opinion in Jefferson County was such that petitioner could not get a fair and impartial jury trial. There is no claim made that discrimination was practiced in the selection of the grand or petit juries. There is no claim made that a continuance would have benefited petitioner.

It might be argued that had counsel been present, he would have entered a plea of not guilty by reason of insanity. True, Code of Alabama 1940, Title 15, Section 423 (See Appendix A), provides that such a plea must be interposed at the time of arraignment, but the Alabama courts have held that such a special plea, with the trial court's permission, may be filed after arraignment. *Baker v. State*, 209 Ala. 142, 95 So. 467; *Sheppard v. State*, 257 Ala. 626, 60 So. 2d 329. Counsel, who was appointed only three days after petitioner's arraignment, considered him sane prior to and at the time of trial; only the affidavit of petitioner's first cousin, once removed, dated May 23, 1957 and introduced in support of a motion for new trial, intimates that counsel, after observing petitioner's erratic behavior at the trial, questioned his sanity. There is no evidence that counsel considered petitioner insane prior to the time of trial.

Finally, the petition for leave to file an application for writ of error coram nobis contained no allegation and offered no evidence that petitioner had been prejudiced or disadvantaged in any way by the absence of counsel at his arraignment.

VIII

CONCLUSION

For the foregoing reasons, respondent contends that the judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

MacDonald Gallion
Attorney General
State of Alabama

George D. Mentz
Assistant Attorney General
State of Alabama

Counsel for Respondent

CERTIFICATE

This is to certify that I, George D. Mentz, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, served two copies of the foregoing Brief and Argument of Respondent on Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama, one of the attorneys of record for petitioner, by mailing them in a properly addressed envelope, with first-class postage prepaid, in the United States mail, and I also served three copies of the foregoing Brief and Argument of Respondent on Thurgood Marshall, 10 Columbus Circle, Suite 1790, New York 19, New York, one of the attorneys of record for petitioner, by mailing them in a properly addressed envelope, with air mail postage prepaid in the United States mail on the _____ day of October, 1961.

George D. Mentz
Assistant Attorney General
State of Alabama
State Capitol
Montgomery 4, Alabama

APPENDIX

Code of Alabama 1940, Title 15, Section 423, reads:

§ 423. (4573) (7176) (4939) INSANITY MUST BE SPECIALLY PLEADED AS A DEFENSE FOR CRIME.—When the defense of insanity is set up in any criminal prosecution it must be by special plea, interposed at the time of arraignment and entered of record upon the docket of the court, which in substance shall be, "not guilty by reason of insanity." Such plea shall not preclude the usual plea of the general issue, which shall not, however, put in issue the question of the irresponsibility of the accused by reason of this alleged insanity, this question being triable only under the special plea.